**IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA**

STACEY HANEY, individually and as Parent and Natural Guardian of, HARLEY HANEY, a minor, and PAIGE HANEY, a minor, and BETH VOYLES, and JOHN VOYLES, husband and wife, ASHLEY VOYLES, individually, LOREN KISKADDEN, individually, GRACE KISKADDEN, individually,

Plaintiffs,

v.

RANGE RESOURCES – APPALACHIA, LLC, et al.,

Defendants.

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STACEY HANEY, individually and as Parent and Natural Guardian of, HARLEY HANEY, a minor, and PAIGE HANEY, a minor, and BETH VOYLES, and JOHN VOYLES, husband and wife, ASHLEY VOYLES, individually, LOREN KISKADDEN, individually, GRACE KISKADDEN, individually,

Plaintiffs,

v.

SOLMAX INTERNATIONAL, INC.,

Defendant.

CIVIL DIVISION

Consolidated at Docket No. 2012–3534

**DEFENDANT RANGE RESOURCES-APPALACHIA, LLC'S RESPONSE IN OPPOSITION TO PITTSBURGH POST-GAZETTE'S OMNIBUS MOTION TO QUASH**

Filed on Behalf of Defendant
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**IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA**

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| STACEY HANEY, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>RANGE RESOURCES – APPALACHIA, LLC, et al.,<br><br>Defendants. | CIVIL DIVISION<br><br>Docket No. 2012–3534 |
| STACEY HANEY, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>SOLMAX INTERNATIONAL, INC.,<br><br>Defendant. | CIVIL DIVISION<br><br>Docket No. 2012–7402 |

**RANGE RESOURCES – APPALACHIA, LLC'S RESPONSE IN OPPOSITION TO PITTSBURGH POST-GAZETTE'S OMNIBUS MOTION TO QUASH**

The Pittsburgh Post Gazette's ("The Post-Gazette") Omnibus Motion to Quash must be denied because it asks this Court to deprive Range Resources – Appalachia, LLC ("Range") of its right to conduct discovery to test the veracity of the Post-Gazette's Petition to Intervene and to support Range's defenses that the Petition is untimely and submitted for an improper purpose. In supporting its request, the Post-Gazette relies on outdated Shield Law and qualified reporter privilege case law, and fails to disclose controlling Pennsylvania Supreme Court authority that rejects the Post-Gazette's overbroad claims of privilege here.

The Pennsylvania Rules of Civil Procedure permit discovery "for use at hearing upon petition." *See also* Pa.R.C.P. 4001(c); 206.7. The Post-Gazette, as Petitioner here, has made verified factual assertions in its Petition. The Post-Gazette must provide evidence, through

testimony or any other means, in support of these claims, or its Petition must fail. Range has a right under the Rules of Civil Procedure to test the veracity of those statements by deposing the publisher and managing editor of the Post-Gazette and its reporter-employees with knowledge of the facts at issue in the Petition.

Furthermore, Range's discovery seeks information relevant to the timing and the purpose of the Post-Gazette's Petition to Intervene, two vitally important factors for determining whether the Post-Gazette may intervene in this matter at all. The Rules state that the Court may deny a Petition to Intervene if "petitioner has unduly delayed in making application for intervention . . .." Pa.R.C.P. 2329(3). The Post-Gazette claims, despite this case being settled and discontinued more than 5 months ago, that it "learned that a civil complaint had been filed in the above-captioned case through various media coverage, including a January 28, 2019 article . . .." Petition at ¶ 2. The Post-Gazette further claims that, "[d]ue to the fact that the Post-Gazette has only recently been made aware of this matter, the Post-Gazette is noticing and presenting this Petition to Intervene and to Unseal Record on an emergency basis." Petition, ¶ 6. Range has reason to doubt the truth of these statements, and intends to test their veracity through discovery. The discovery requests involving the January 28th article referenced in the Post-Gazette's Petition are directly relevant to the timeliness of the Post-Gazette's Petition. As such, they are discoverable.

Additionally, Range has the right to test the veracity of the Post-Gazette's assertion that it has filed its Petition to further the public interest in access to the courts. Specifically, Range seeks to discover whether instead, the Post-Gazette is seeking to intervene for an improper purpose. Through the subpoenas at issue here, Range seeks to discover the facts and circumstances behind the timing of the Post-Gazette's Petition, which was scheduled to be heard by this Court on the same day as an argument related to Stacey Haney's Motion for Protective Order.

Finally, the Post-Gazette's arguments about the scope of the Shield Law and qualified reporter privilege are simply wrong. The Pennsylvania Shield Law does not protect non-confidential sources of information, nor does it protect reporter notes or other unpublished material if the materials could not reasonably lead to the discovery of the identity of confidential sources. *See Com. v. Bowden,* 838 A.2d 740. 751 (Pa. 2003); *Hatchard v. Westinghouse Broadcasting Co.,* 532 A.2d 346 (Pa. 1987). To the extent that the subpoenas call for information that may reveal confidential sources, the proper method to protect that information is for any reporters who properly promised confidentiality to affirmatively declare that confidential status has been granted to a source, and to redact only such information that may identify the source, log the basis for any redaction, and for counsel to object and instruct the witness accordingly in a deposition.

Similarly, the qualified reporter's privilege either does not apply or should be overcome here. By asserting its alleged limited knowledge of this case and the purpose behind its attempts to unseal the record as a factual basis for its Petition, the Post-Gazette cannot hide behind the qualified privilege when the veracity of those assertions is questioned. Indeed, determining when the *Post-Gazette was aware* of this case, the confidential settlement, and the sealing of records at issue here, and *why the Post-Gazette is seeking* to unseal them now is information that is necessary to this Court's decision whether to grant intervention and whether to unseal the records. The only logical sources of that knowledge are the subpoenaed individuals and entity.

For these reasons, this Court should deny the Motion to Quash in its entirety, and allow the depositions *duces tecum* to proceed.

## FACTUAL AND PROCEDURAL BACKGROUND

1. On February 7, 2019, the Post-Gazette presented an Emergency Petition to Intervene and Unseal Record. The Petition sought first to intervene in this settled, discontinued, and closed

matter, and second to unseal a June 15, 2018 Motion and Order and a September 11, 2018 Motion[1] that were ordered to be filed under seal by the Honorable Katherine B. Emery. *See* Petition to Intervene at ¶ 3. Range filed its Response in Opposition to the Petition to Intervene disputing the Petition's factual basis and raising other procedural and substantive objections to the intervention and unsealing requests.

2. In response, the Court scheduled a hearing on the Post-Gazette's Petition, and stated that the hearing would address the Post-Gazette's request to intervene and, if intervention was granted, the request to unseal records. *See* Feb. 7, 2019 Order and Transcript. The hearing is now scheduled for March 25, 2019 at 9:00 a.m. *See* Feb. 15, 2019 Order.

3. Pursuant to its procedural right to conduct discovery on the Post-Gazette's Petition, on February 25, 2019, Range served Notices of Deposition *Duces Tecum* for PG Publishing Co. d/b/a The Pittsburgh Post-Gazette, Sally Stapleton, Don Hopey, and David Templeton. Notice was provided 15 days in advance of the scheduled deposition date of March 12, 2019. At the same time, Range contacted counsel for the Post-Gazette, to inquire whether he would accept service of the subpoenas. *See* Feb. 25, 2019 Emails, *attached as* Ex. 1.

4. On February 26, 2019, after counsel for the Post-Gazette informed Range he would accept service of the four subpoenas, Range served the subpoenas. *See* Subpoenas Directed to PG Publishing Co., Sally Stapleton, Don Hopey, and David Templeton, *attached as* Exs. 2-5. The subpoenas were served a full two weeks before the scheduled March 12, 2019 deposition date.[2]

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[1] The Post-Gazette's Petition improperly identifies the September 11, 2018 Order as under seal. The docket shows it is not.

[2] As is evident from the scheduling of all four depositions on the same date, Range simply intends to obtain the discovery it needs as efficiently as possible.

5. On Friday, March 1, 2019, the Post-Gazette served the parties with a letter stating that "The Pittsburgh Post-Gazette will be filing a motion to quash the subpoenas" and that the motion would be scheduled for presentation on Friday, March 8, 2019 at 8:45 a.m. The letter did not include the actual motion or the grounds upon which Petitioner sought to quash the subpoenas.

6. On Monday, March 4, 2019, less than four days before its scheduled presentation, the Post-Gazette served a copy of its Omnibus Motion to Quash.

7. Contrary to Washington County Local Rules, at no time did the Post-Gazette contact Range to meet and confer about its objections to the subpoenas in advance of serving and presenting the instant Motion. *See* Wash. L.R.C.P. 208.2(e) (Duty to Confer; Discovery); 208.2(c)(1) ("Prior to the presentation of an unconsented motion, counsel and/or the parties shall confer to attempt to resolve the subject matter of the motion."). Nor did the Post-Gazette include the required Certificate of Compliance that is mandated by Local Rule 208.2(c)(1).[3]

## ARGUMENT

### I. Range's Subpoenas and Discovery Requests Are Permitted Under the Rules of Civil Procedure, and They Seek Information Relevant and Important to Issues to Be Determined at the March 25, 2019 Hearing.

#### A. Discovery is Permitted For Use at a Hearing Upon Petition.

8. The Rules of Civil Procedure regarding depositions and discovery provide, "any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for preparation of pleadings, or for preparation or trial of a case **or for use at a hearing upon petition, motion or rule**, or for any combination of the foregoing purposes." Pa. R.C.P. 4001(c).

[3] This Court may deny the Post-Gazette's Motion based on its failure to comply with these mandatory Local Rules.

9. Indeed, as Range disputes the factual basis for the Post-Gazette's Petition, the procedural rules grant Range the *right* to discovery. *See* Pa. R.C.P. 206.7 (permitting discovery of disputed facts after issuance of a rule to show cause); Wash. L.R.C.P. 206.4(c)(1)(a) (dictating that a Petition seek the issuance of a rule to show cause).

10. "[A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Pa. R.C.P. 4003.1(a).

11. Thus, the Rules of Civil Procedure clearly permit Range to pursue discovery with respect to the facts and claims alleged in the Post-Gazette's Petition and Range's defenses to those claims.

**B. The Timing and Purpose of the Post-Gazette's Petition are Relevant and Important to the Post-Gazette's Request to Intervene and Unseal Records.**

12. "At any time **during the pendency of an action**, a person not a party thereto shall be permitted to intervene therein, subject to these rules, if ..." one of the four specified criteria in the rule is met. Pa. R.C.P. 2327; *see, e.g., In re T.T.*, 842 A.2d 962, 964-65 (Pa. Super. Ct. 2004) ("To petition the court to intervene after a matter has been finally resolved is not allowed by the Rules of Civil Procedure; it is only during the pendency of an action that a court may allow intervention."); *Santangelo Hauling, Inc. v. Montgomery Cty.*, 479 A.2d 88, 89 (Pa. Commw. Ct. 1984) ("if an action is no longer pending, a court would have no power to permit intervention; and, a hearing on the petition would be a futile exercise."); *Inryco Inc. v. Helmark Steel Inc.*, 451 A.2d 511, 513 (Pa. Super. Ct. 1982) ("The parties reached a settlement, and it was not until after a settlement was

negotiated that appellants sought to invoke the court's jurisdiction via a petition to intervene and rescind or modify the court's order. At this point in the litigation, intervention was not proper.").

13. Furthermore, "Upon the filing of the petition and after hearing . . . the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; **but an application for intervention may be refused, if . . . (3) the petitioner has unduly delayed in making the application for intervention . . .."** Pa. R.C.P. 2329; *see, e.g., In re T.T.* 842 A.2d 962 ("especially where the party proposing its intervention has had ample notice and opportunity to protect its interests earlier, to allow intervention [after a matter has been finally resolved] would unduly prejudice the interests of a party in whose favor the matter has been resolved.").

14. In its verified Petition, the Post-Gazette makes several assertions related to *when* and how the Post-Gazette became aware of this lawsuit. Petition at ¶¶ 2, 5-6. The truth of these assertions is directly relevant to whether the Post-Gazette unduly delayed its Petition, and under the Rules, this issue may be dispositive as to whether the Court grants the Petition to Intervene.

15. For example, the Post-Gazette asserts that it "learned that a civil complaint had been filed in the above-captioned case through various media coverage, including a January 28, 2019 article titled 'State conducting criminal investigation of shale gas production,'" and that "[t]he article was published by The Post-Gazette and stated that the Plaintiffs had previously filed a civil case against the Defendants in 2012 . . .." Petition at ¶ 2. The Post-Gazette further asserts "it has only recently been made aware of this matter." *Id.* at ¶¶ 5-6.

16. The Petition allegations, and the assessment of their veracity, are central to Range's defense of the Petition to Intervene on the grounds of undue delay under Pa. R.C.P. 2329(3). Range's subpoenas, documents requests, and corporate designee topic list are targeted to discover

the basis for the allegations and facts related to these allegations, and will allow Range – and ultimately the Court – to assess their truth.

17. Indeed, the Post-Gazette asserts in its Petition that it learned about this matter through its own January 28th article. Yet within that published article, the Post-Gazette reveals it possesses documents and other knowledge that appear to belie the Post-Gazette's assertion that it only recently learned of this matter. Range is entitled to test the Post-Gazette's claims by discovering that information.[4]

18. The discovery sought by Range is also relevant to the issue of improper purpose for intervention and unsealing. *See Katz v. Katz*, 514 A.2d 1374, 1377 (Pa. Super. Ct. 1986) (refusing media access to court-sealed records "where such access may become a vehicle for harmful or improper purposes.") Indeed, while there is a presumption of openness to court records, the media does not have *carte blanche* to unseal records for an improper purpose. *See id.* Range's subpoenas and requests are targeted at discovering the Post-Gazette's purpose for intervening in the case when it did, conspicuously in conjunction with Plaintiff Stacey Haney's Motion for a Protective Order seeking use of confidential settlement terms for her own personal gain.

19. As such, Range's discovery requests are relevant and important to Range's defense of the Post-Gazette's Petition, and are within the scope of discovery permitted by the Rules of Civil Procedure.

[4] In *Sprague v. Walter*, 543 A.2d 1078, 1083 (Pa. 1988), the Pennsylvania Supreme Court stated that no inference regarding the reliability or accuracy of information provided by an unidentified source could be drawn from invocation of the Shield Law. Thus, Petitioner cannot assert facts supporting its Petition and then invoke the Shield Law to conceal discovery of those facts.

### C. Each of Range's Subpoenas and Accompanying Document Requests Are Relevant and Important to the Determination of the Post-Gazette's Petition to Intervene and Motion to Unseal

20. Range's subpoenas and document requests are narrowly targeted to discover facts that are relevant and important to the issues to be determined at the March 25, 2019 hearing.

21. First, Range has subpoenaed the following to attend and testify at a deposition on March 12, 2019: PG Publishing Co. d/b/a The Pittsburgh Post-Gazette; Sally Stapleton, Managing Editor and the individual who verified the Petition; Don Hopey, author of more than ten articles in the Post-Gazette relating to the substance and procedure of the above-captioned matter, including the January 28, 2019 article referenced in Paragraph 2 of the Petition; and David Templeton, co-author of the January 28, 2019 article referenced in Paragraph 2 of the Petition. *See* Exs. 2-5.[5]

22. Document Request No. 1, seeks any and all documents reflecting communications between the Post-Gazette and the Plaintiffs in this case or their attorneys. *See, e.g.,* Ex. 2. This request is relevant and important to the issue of when the Post-Gazette was aware of the above-captioned case, when the Post-Gazette became aware that this case had settled, and when the Post-Gazette was aware that certain documents were filed under seal in this case. Furthermore, the request seeks to discover information relevant and important to whether the Post-Gazette seeks to intervene in this case for the improper purpose of aiding any of the Plaintiffs' in improperly circumventing their contractual obligations pursuant to the settlement agreement, as opposed to unseal records for the public interest in open courts.

23. Similarly, Document Requests Nos. 2-6 specifically explain that they seek information that supports the Post-Gazette's assertions in the Petition. These assertions relate to the

[5] The Document Requests included in each subpoena are nearly identical.

timing of the Post-Gazette's knowledge of sealed documents in this case, and seek explanation as to why the Post-Gazette waited more than five months after the close of this matter to intervene.

24. Document Requests Nos. 7-15 all relate to the Post-Gazette's assertion in Paragraph 2 of the Petition that it first learned of this case when the January 28, 2019 article was published in the Pittsburgh Post-Gazette. Each request targets certain information reflected in the January 28, 2019 article that Range has reason to believe would shed light on when the Post-Gazette learned about this matter and its settlement. For example, referenced in the article are certain letters from August and September 2018, along with a statement that one of the letters was "introduced during an August court hearing" in this case. *See, e.g.*, Ex. 2, Document Request No. 7(a)-(c). When the Post-Gazette had possession or knowledge of such letters and learned about the August court hearing is relevant the veracity of the Post-Gazette's claim that it "only recently" became aware of the matter. Petition, ¶ 5-6.

25. Request No. 16 seeks documents, including reporter's notes, that would indicate the Post-Gazette's or its employees' knowledge of this case and related actions and various attempts to unseal or otherwise disclose information in the sealed records at issue. Again, this request goes directly to the timing of the Post-Gazette's knowledge of this matter and the purpose of the Post-Gazette's intervention here.

26. Request No. 17 seeks information that would show whether the Post-Gazette has successfully intervened in a case that is no longer pending from 1950 to the present. Range is unable to locate a single instance in Pennsylvania where a media outlet has successfully intervened in a matter months after it has closed. As such, this request seeks information related to the timing

of the Post-Gazette's request and whether such a late intervention is permitted under Pennsylvania law.[6]

27. With respect to the topics of testimony attached to the Notice of Deposition for PG Publishing Co., the Rules of Civil Procedure require a party, when noticing a deposition to a corporate entity, to identify topics of the proposed testimony, so that the corporate entity can designate a person to testify on those topics on the entity's behalf. *See* Pa. R.C.P. 4007.1(e); Ex. 2, Exhibit B to Notice of Deposition *Duces Tecum* to PG Publishing Co.[7]

28. Similarly to the Document Requests, the proposed topics of testimony are relevant and important to Range's defenses to the Petition to Intervene. Specifically, the topics are intended to target facts regarding the Post-Gazette's knowledge and timing of that knowledge with respect to the subject matter of the Petition. Additionally, the topics seek testimony with respect to the Post-Gazette's purpose for filing its Petition.

29. For example, Topic No. 1 simply seeks testimony regarding the factual basis for the verified assertions made in the Petition, particularly paragraphs 2, 3, 5, 6, and 33. These are allegations that go to the timing of the Post-Gazette's knowledge of this case and whether the Post-Gazette's delay in filing the Petition was undue. Further, Topic 1 seeks testimony related to the purpose of the Post-Gazette's Petition to Intervene, and whether it is proper. *See Katz,* 514 A.2d 1374.

30. Topic Nos. 2-5, similar to Document Requests 7-15, relate to the Post-Gazette's assertion in Paragraph 2 of the Petition that it first learned of this case upon its own publication of

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[6] Although the Post-Gazette has not objected to the timeframe scope of this request, Range is willing to discuss a more limited timeframe for responsive materials as long as Petitioner concedes it will not seek to use responsive information at the hearing that is outside any agreed-upon, limited timeframe.

[7] Only the subpoena directed to a corporate entity, here the PG Publishing Co., contains a list of topics of testimony, pursuant to Pa. R.C.P. 4007.1(e).

the January 28, 2019 article. The topics target information reflected in the January 28, 2019 article that Range has reason to believe would shed light on when the Post-Gazette learned about this matter and its settlement. These proposed topics of testimony go directly to the veracity of the Post-Gazette's claim that it "only recently" became aware of the matter. *See* Petition, ¶ 2, 5-6.

31. Topic 6, like Document Request 16, seeks information that would indicate the Post-Gazette's knowledge of this case and related actions and various attempts by Plaintiffs to unseal or otherwise disclose information in the sealed records at issue. Again, this request goes directly to the timing of the Post-Gazette's knowledge of this matter and the purpose of the Post-Gazette's intervention here.

32. Topic 7 seeks information regarding the process of how information flows up from reporters to editors and into publication at the Post-Gazette, including policies for approval of grant of confidentiality to sources. This is relevant to the issue of whether a reporter's knowledge of a topic would be within the knowledge of an editor and/or the company itself and whether any later assertion of the existence of a confidential source is legitimate. Additionally, the topic seeks testimony regarding document retention policies, which is a standard topic for discovery, anticipating issues of failure to produce responsive documents or loss or spoliation of evidence.

33. Topic 8 addresses the procedure used to collect documents in connection with the subpoena and deposition testimony. Again, this is a standard discovery request that anticipates issues related loss or spoliation of responsive documents and whether a good faith search for responsive documents was conducted.

34. Topic 9 seeks information related to the common use of confidentiality clauses in settlements, and whether the PG Publishing Company has entered into such agreements. This topic seeks evidence in support of Range's position that there is a governmental interest in encouraging settlements and maintaining confidentiality of settlements and/or mediation.

35. Each of Range's subpoenas and accompanying document requests are targeted to discover testimony and documents that are relevant and important to Range's defenses to the Petition to Intervene and Unseal Records, and relevant to the issues that will be the subject of the March 25, 2019 hearing. Specifically, the question of whether the Post-Gazette unduly delayed its Petition to Intervene in this matter, and whether the Post-Gazette is seeking to intervene for the improper purpose of aiding Plaintiffs in skirting the contractual requirements of their confidential settlement agreement. As such, the discovery is well within the scope of the Rules of Civil Procedure and must be permitted.

## II. The Post-Gazette has Failed to Offer Verified Statements or Other Showings That the Discovery Requests Seek Privileged Material, and Regardless, Quashing of Entire Subpoenas is Not the Proper Vehicle to Raise Objections to Discovery on the Basis of a Privilege.

36. As a threshold matter, a party asserting a privilege must initially set forth facts showing that the privilege has been properly invoked. *See, e.g., Joe v. Prison Health Services, Inc.* 782 A.2d 24 (Pa. Commw. Ct. 2001) (rejecting application of deliberative process privilege and stating "the government must present more than a bare conclusion or statement that the documents sought are privileged").

37. The Post-Gazette has failed to assert in its Motion that any of the testimony or documents sought by Range will reveal a *confidential* source, as required for the Shield Law to apply. *See infra*, section III.

38. Without such support, the Motion to Quash must fail. *See Com v. Hess*, 411 A.2d 830, 833 (Pa. Super. Ct. 1979) ("It is axiomatic that no claimant of a testimonial privilege can be the final arbiter of his claim, a rule well recognized in several related contexts.") (collecting cases); *Perkins v. Watsula*, No. 76-4946-03-2, 1978 WL 655, *2 (Pa. Com. Pl. Ct. May 11, 1978) (explaining that the initial burden of establishing a privilege "firmly rests upon the party objecting to discovery").

39. Notably, only Mr. Hopey provided verification of the Omnibus Motion to Quash and that verification was expressly and solely made on behalf of "The Pittsburgh Post-Gazette."

40. To the extent that any legitimate confidential sources would be revealed by the questions posed during the noticed depositions or in response to the document requests, those should be raised in the deposition or through the provision of a privilege log that identifies the document in question and the privilege claimed.

41. As is typical in discovery practice, when a question or discovery request seeks relevant information that also includes responsive but privileged testimony or other information, the proper procedure is to object to the question, or redact and log the document and produce a privilege log. The same procedure should apply here.

## III. The Pennsylvania Shield Law Does Not Protect The Testimony and Documents that Range Seeks to Discover.

42. The Post-Gazette's Motion to Quash fails to disclose binding Supreme Court precedent that governs the issues presented and flatly rejects the arguments advanced by the Post-Gazette. *Com. v. Bowden*, 838 A.2d 740 (Pa. 2003) (copy of opinion *attached as* Ex. 6); *Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346 (Pa. 1987) (copy of opinion attached as Ex. 7). Instead, the Post-Gazette's Motion relies almost exclusively on *In re Taylor*, 193 A.2d 181 (Pa. 1962), a decision that the Supreme Court has explicitly narrowed and limited to its facts. *See Hatchard,* 532 A.2d at 351; *Bowden*, 838 A.2d at 748-49.

### A. The Shield Law Only Protects Confidential Sources.

43. In *Hatchard*, the Supreme Court "modified the expansive interpretation of Shield Law as set forth in *Taylor.*" *Sprague v. Walter,* 543 A.2d 1078, 1083 (Pa. 1988). The *Hatchard* Court held that information which does not reveal the identity of a confidential personal source of the information or which may be redacted to eliminate revelation of a confidential personal source of the information is not protected by the Shield Law. *Hatchard*, 532 A.2d at 351. The *Hatchard*

Court explicitly rejected broad interpretations of *Taylor*, such as those advanced in the Post-Gazette's Motion to Quash, finding, "[t]o the extent that language in *In re Taylor* may be read as interpreting the Shield Law to protect from discovery . . . documentary material that could not reasonably lead to the discovery of an identity of a confidential media-informant, that decision interpreted the Shield Law much too broadly." *Id; see also Bowden*, 838 A.2d at 749. The holding of *Hatchard* centers on protecting only the identity of a confidential source and, therefore, directly contradicts the argument advanced by the Post-Gazette that the Shield Law protects materials "even when the source is known." Post-Gazette Motion to Quash, ¶11. *See also Sprague*, 543 A.2d at 1083 ("The language of our Shield Law reflects this purpose by protecting the media against the forced **disclosure of the identity of its sources."**) (emphasis supplied).

44. Further, the Supreme Court recognized that the purposes of the Shield Law are effected without the absolute protection the Post-Gazette now seeks. The *Hatchard* Court opined:

> providing an absolute shield could hardly be said to be necessary to effectuate the purpose of the Shield Law ... [w]e see no apparent reason why the objective of promoting free flow of information to the media would be defeated so long as any documentary information that could leads to the discovery and the identity of the confidential source is shielded from disclosure.

*Hatchard*, 532 A.2d at 350; s*ee also Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. Ct. 1997) (compelling production of reporter's notes where such materials would not reveal the identity of a confidential personal source of information). As a result, there is no basis in law for the sweeping protection the Post-Gazette now seeks. *See* Motion to Quash, ¶¶ 11, 17.

45. In *Bowden,* the Supreme Court reaffirmed its modified interpretation of *Taylor.* There the Court held:

> we construe *Taylor*, as interpreted by *Hatchard* and *Sprague*, as standing for the proposition that documents may be considered sources for Shield Law purposes, but only where they production of such documents, even if redacted, could breach confidentiality of the

> identity of a human source and thereby threaten the free flow of information from the confidential informants to the media.

*Bowden*, 838 A.2d at 752.

46. Additionally, the *Bowden* Court explicitly distinguished *Taylor* based on its facts: *Taylor* concerned allegations of widespread government corruption and production of the requested documents would likely identify numerous secondary human sources. *Bowden*, 838 A.2d at 749 (finding "the facts of *Taylor* are readily distinguishable from the instant case" and compelling reporters to testify about and reveal their notes taken at their interviews of a murder suspect.)

47. Accordingly, and contrary to the Post-Gazette's contentions, *Taylor* is not controlling. *Hatchard* and *Bowden* directly address and control the present issues and, for the reasons explained below, require that the subpoena recipients testify and produce all requested information.

### B. The Post-Gazette Has Not Alleged The Information Sought Would Disclose a Confidential Source.

48. The Supreme Court decisions in *Bowden* and *Hatchard* confirm that only *confidential* source information is protected and compel the denial of Post-Gazette's Motion to Quash. *See Bowden*, 838 A.2d 751-52 (finding interpretation of the Shield Law espoused in *Hatchard* applies beyond defamation cases and across all settings).

49. First, the Post-Gazette has not claimed that a confidential source exists.[8] *Bowden*, 838 A.2d at 752 (compelling disclosure of materials where there was "no indication of an allegation

[8] Notably, only Mr. Hopey provided verification of the Post-Gazette's Omnibus Motion to Quash. Mr. Hopey's verification was expressly limited to be on behalf of "the Pittsburgh Post-Gazette" which cannot legally assert a reporter's privilege. *See* 42 Pa. C.S. § 5942 (the statute provides that "[n]o **person** engaged on, connected with, or **employed by** any newspaper of general circulation...shall be required to disclose the source of any information...") (emphasis added).

that [murder suspect's] statements to reporters reveal the identities of any secondary confidential sources.").

50. Second, the Post-Gazette has failed to allege, much less verify, that the information sought by Range would, in fact, reveal the identity of a confidential source.

51. As the Post-Gazette has not even alleged that a confidential source exists, the Shield Law cannot apply and the information is discoverable by Range. *Bowden*, 838 A.2d at 752.

## IV. The Qualified Reporter's Privilege Does Not Protect The Testimony and Documents That Range Seeks to Discover Because Only The Publisher of the Post-Gazette and Its Reporters Possess Knowledge of the Timing and Purpose Behind the Petition and Such Information Is Crucial to Range's Defenses to the Petition.

52. Under Pennsylvania law, "reporters have a qualified right to refuse to disclose their sources and materials." *Bowden*, 838 A.2d at 752 (emphasis supplied). As an initial matter, "those asserting the privilege must overcome the well-settled principle that evidentiary privileges are not favored in litigation because they are in derogation of the search for truth." *Id.* at 754 (citing to *U.S. v. Criden*, 633 F.2d 346, 357-58 (3d Cir. 1980) ( "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.")).

53. A party seeking disclosure of information may overcome the qualified reporter's privilege by demonstrating: (1) it has made an effort to obtain the information from another source; (2) the only access to the information sought is through the journalist and his or her sources; and (3) the information sought is crucial to its claim. *Bowden*, 838 A.2d at 755 (finding qualified reporter's privilege did not protect reporter from compelled disclosure of murder suspect's statements). *See also DiPaolo v. Times Pub. Co.*, 142 A.3d 837, 845 (Pa. Super. Ct. 2016) (reporter's privilege did not protect reporters' notes and resource materials from disclosure). Principle and policy considerations may warrant a relaxation of the three-part test in certain circumstances. *Bowden*, 838 A.2d at 755.

54. Determination of whether the qualified reporter's privilege has been overcome must be made on a case-by-case basis, balancing the rights of the reporters under the First Amendment against interests of those seeking information reporter possess. *Davis*, 705 A.2d at 885 (finding that qualified reporter's privilege did not protect reporter's notes of interview on which newspaper article was based). If the party seeking disclosure overcomes the reporter's privilege, unpublished materials, including the reporter's notes are discoverable. *See, e.g., DiPaolo,* 142 A.3d at 845 (reporter's privilege did not protect reporter's notes and resource materials from disclosure); *Davis*, 705 A.2d at 885 (qualified reporter's privilege did not protect reporter's notes of interview on which newspaper article was based); *Bowden*, 838 A.2d at 752 (qualified reporter's privilege did not protect reporter from compelled disclosure of murder suspect's statements).

55. Here, Range has overcome the qualified reporter's privilege. First, as in *Bowden*, the materials and information Range seeks are only available from the subpoenaed parties, and therefore, Range has satisfied the first two parts of the three part test. *Bowden*, 838 A.2d at 756-7 ("[r]egarding the second criterion...the analysis is the same as the first criterion").

56. The materials sought are relevant to Petitioner's purpose in seeking to intervene to unseal the records at issue and when it knew about the settlement information here. There is no source other than the subpoenaed parties who can reveal what the Post-Gazette knew, when the Post-Gazette became aware of such information, and the Post-Gazette's motivation for seeking disclosure of the settlement agreement. *Bowden,* 838 A.2d at 755-56 (finding that there was no other source of the information but the criminal defendant and the criminal defendant was not an acceptable source of the information because *inter alia* the reporters' notes are "by their very nature unique."); *DiPaolo,* 142 A.3d at 845 (information sought goes to states of minds of reporters which was "material, relevant, necessary and crucial to the defamation claims at issue).

57. The information sought by Range is important and relevant to determining whether the Post-Gazette should be permitted to intervene and whether disclosure of the records at issue is appropriate. The Post-Gazette's knowledge of this matter and its purpose in intervening are material, relevant, necessary, and crucial to determining: the timeliness of its petition, the veracity of the statements in the Petition to Intervene and to Unseal Records, and the Post-Gazette's motivation for seeking disclosure of the records at issue. *See Katz,* at 1377 (courts may deny access to judicial records or proceeding "where such access may become a vehicle for harmful or improper purposes."); *Bowden,* 838 A.2d at 755-56 (statements of murder suspect to news reporters were "directly relevant and crucial to countering his self-defense theory and impeaching his credibility."); *DiPaolo*, 142 A.3d at 845 (information sought goes to states of minds of reporters which was "material, relevant, necessary and crucial" to the defamation claims at issue).

58. Accordingly, Range has satisfied the third part of the three part test and is entitled to the information requested in its Subpoenas to Attend and Testify and Notices *Duces Tecum* served on the PG Publishing Company Co., Ms. Stapleton, Mr. Templeton and Mr. Hopey. *See, e.g., DiPaolo,* 142 A.3d at 845 (reporter's privilege did not protect reporters' notes and resource materials from disclosure); *Davis*, 705 A.2d at 885 (qualified reporter's privilege did not protect reporter's notes of interview on which newspaper article was based).

## V. The Post-Gazette Is Not Entitled to Sanctions or Fees

59. The Post-Gazette seeks an award of counsel fees under 42 Pa. C.S.A. § 2503(7) but offers no authority for the award of sanctions or fees based on the service of discovery requests here.

60. Any award of counsel fees pursuant to 42 Pa.C.S. § 2503(7) must be supported by a trial court's specific finding of dilatory, obdurate or vexatious conduct. *Twp. of S. Strabane v. Piecknick*, 686 A.2d 1297, 1301 (Pa. 1996) (reversing award of counsel fees).

61. As explained above, Range is entitled to discovery in advance of the March 25, 2019 hearing, and any blanket application of the Shield Law or qualified reporter's privilege is improper under Pennsylvania law.

62. Accordingly, there is no basis for findings of improper discovery conduct and the request for fees is meritless.

63. Indeed, the Post-Gazette's bald assertions of bad faith and harassment are particularly brazen, when in the same Motion, the Post-Gazette fails to candidly inform the Court of the controlling Pennsylvania Supreme Court precedent governing the Pennsylvania Shield Law and qualified reporter's privilege and promotes legal arguments that have been rejected by the Supreme Court. *See supra* sections III-IV.

64. The Post-Gazette's decision to resort to name-calling and baseless assertions of "harassment" in the face of their lack of candor to the Court and failure to meet and confer is a continuation of its own questionable and harassing tactics. In the weeks leading up to its Petition, a Post-Gazette reporter placed a barrage of telephone calls to Range employees that was extreme, continuous, and disruptive.

65. Additionally, the Post-Gazette's request for fees is inappropriate, because the Post-Gazette failed to meet and confer with Range regarding the discovery requests prior to Motion as required by the Local Rules and general standards of professionalism. *See* Wash. L.R.C.P. 208.2(e); 208.2(c)(1).

66. Accordingly, the Post-Gazette's request for fees is meritless and should be denied.

## CONCLUSION

For all these reasons, Range respectfully requests that the Court deny the Omnibus Motion to Quash with prejudice.

Respectfully submitted,

Kimberly A. Brown, Esquire
PA I.D. No. 56200
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219

*Attorneys for Defendant Range Resources - Appalachia, LLC*

**IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA**

| | |
|---|---|
| STACEY HANEY, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>RANGE RESOURCES – APPALACHIA, LLC, et al.,<br><br>Defendants. | CIVIL DIVISION<br><br>Docket No. 2012–3534 |
| STACEY HANEY, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>SOLMAX INTERNATIONAL, INC.,<br><br>Defendant. | CIVIL DIVISION<br><br>Docket No. 2012–7402 |

**ORDER OF COURT**

On this ____ day of March, 2019, upon consideration of The Pittsburgh Post-Gazette's Omnibus Motion to Quash Subpoenas, For Protective Order and Award of Counsel Fees, and response thereto, it is hereby ORDERED, ADJUDGED AND DECREED that the Omnibus Motion is DENIED with prejudice. The depositions *decus tecum* scheduled for March 12, 2019 shall proceed as noticed.

_____, J.

# EXHIBIT 1

**Brown, Kimberly A.**

**From:** Brown, Kimberly A.
**Sent:** Monday, February 25, 2019 6:17 PM
**To:** Frederick Frank
**Subject:** RE: Stacey Haney, et. al v. Range Resources - Appalachia LLC, et al.

Ok; I'll hold them until then unless you get back to me earlier.
Kim

Kimberly A. Brown
Sent with BlackBerry Work
(www.blackberry.com)

---

**From:** Frederick Frank <frank@fgbmp.com>
**Date:** Monday, Feb 25, 2019, 6:09 PM
**To:** Brown, Kimberly A. <kabrown@jonesday.com>
**Subject:** RE: Stacey Haney, et. al v. Range Resources - Appalachia LLC, et al.

Kim- I expect I can be back to you by 3 p.m. FF

*Frederick N. Frank*

Frank, Gale, Bails, Murcko & Pocrass, P.C.
Gulf Tower, Suite 3300
707 Grant Street
Pittsburgh, PA 15219
412.471.5912 (p)
412.471.7351 (f)



---

**From:** Brown, Kimberly A. <kabrown@jonesday.com>
**Sent:** Monday, February 25, 2019 6:08 PM
**To:** Frederick Frank <frank@fgbmp.com>
**Subject:** RE: Stacey Haney, et. al v. Range Resources - Appalachia LLC, et al.

Fred,
Can you get back to me by 3pm ? I am a bit limited since if you are not representing the witnesses and accepting service, I need to serve to give them adequate notice.
Kim

Kimberly A. Brown (bio)
Partner
JONES DAY® - One Firm Worldwide℠
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
Office +1.412.394.7995
Fax +1.412.394.7959
kabrown@jonesday.com

---

**From:** Frederick Frank <frank@fgbmp.com>
**Sent:** Monday, February 25, 2019 5:55 PM
**To:** Brown, Kimberly A. <kabrown@jonesday.com>
**Subject:** RE: Stacey Haney, et. al v. Range Resources - Appalachia LLC, et al.

Kim:

I am tied up in the morning. Can you please give me until the afternoon to deal with this?

F

*Frederick N. Frank*

Frank, Gale, Bails, Murcko & Pocrass, P.C.
Gulf Tower, Suite 3300
707 Grant Street
Pittsburgh, PA 15219
412.471.5912 (p)
412.471.7351 (f)

**From:** Brown, Kimberly A. <kabrown@jonesday.com>
**Sent:** Monday, February 25, 2019 5:19 PM
**To:** Frederick Frank <frank@fgbmp.com>
**Subject:** Stacey Haney, et. al v. Range Resources - Appalachia LLC, et al.

Mr. Frank :
Please advise as to whether you are authorized and willing to accept service of subpoenas *duces tecum* directed to the following : Sally Stapleton; The PG Publishing Company d/b/a The Pittsburgh Post-Gazette; Don Hopey; and David Templeton. If I don't hear from you by 11 am tomorrow, we will move forward with service of the subpoenas.
The deposition notices will follow shortly scheduling the depositions for Tuesday, March 12 starting at 9 am.
Please feel free to call me with any questions.
Kim
Kimberly A. Brown (bio)
Partner
JONES DAY® - One Firm Worldwide℠
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
Office +1.412.394.7995
Fax +1.412.394.7959
kabrown@jonesday.com


***This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.***

# EXHIBIT 2

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF Washington

Stacey Haney, et al.,
Plaintiffs
v.

Range Resources-Appalachia LLC, et al.,
Defendants

File No. 2013-3594

**SUBPOENA TO ATTEND AND TESTIFY**

TO: PG Publishing Co. d/b/a The Pittsburgh Post-Gazette c/o Frederick N. Frank, Esq. 707 Grant Street, Suite 3300 Pittsburgh, PA 15219

1. You are ordered by the court to come to Jones Day 500 Grant Street, Suite 4500

(Specify courtroom or other place)

at Pittsburgh, Allegheny County, Pennsylvania, on March 12, 2019 at 4:00 o'clock, P. M., to testify on behalf of PG Publishing Co.

in the above case, and to remain until excused.

2. And bring with you the following: Please see Exhibits A and B

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

REQUESTED BY A PARTY/ATTORNEY IN COMPLIANCE WITH Pa.R.C.P. No. 234.2(a):
NAME: Kimberly A. Brown, Esq.
ADDRESS: 500 Grant Street, Suite 4600
Pittsburgh, PA 15219
TELEPHONE: 412-391-3939
SUPREME COURT ID # 56200

BY THE COURT:

Joy Schury Ranko (ts)
Prothonotary/Clerk, Civil Division

Date: _____

Seal of the Court

Sandra D. Bedillion (ts)
Deputy

JOY SCHURY RANKO, PROTHONOTARY
My Term Expires First Monday in January, 2020

OFFICIAL NOTE: This form of subpoena shall be used whenever a subpoena is issuable, including hearings in connection with depositions and before arbitrators, masters, commissioners, etc. in compliance with Pa.R.C.P. No. 234.1. If a subpoena for production of documents, records or things is desired, complete paragraph 2.

**EXHIBIT A TO NOTICE OF DEPOSITION DUCES TECUM OF PG PUBLISHING CO. D/B/A THE PITTSBURGH POST-GAZETTE**

**DEFINITIONS**

- The "POST-GAZETTE," or "YOU" or "YOUR" shall mean for the purpose of this notice PG Publishing Company d/b/a The Pittsburgh Post-Gazette, and its employees, agents and representatives.
- The "Post-Gazette's Petition" or "Petition" shall mean the document titled "Emergency Petition to Intervene and to Unseal Record" filed in the HANEY-RANGE LITIGATION on February 7, 2019.
- "COMMUNICATION" or "COMMUNICATE" shall mean for the purpose of this notice ANY act or instance whereby messages, facts, opinions, data or ANY other information is transmitted orally, visually, in writing, electronically or by ANY other means or media from one or more persons to one or more other persons and shall include the transmission, the messages, facts, opinions, data or other information transmitted, and the process by which the transmission was effected.
- "DOCUMENT" shall be an all-inclusive term that shall be used in its broadest sense and is to include ANY medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the following, whether printed, typewritten, recorded, filmed or reproduced by ANY mechanical process or written or produced by hand, *and whether an original, master or copy*, and whether or not claimed to be privileged from discovery, namely: **reporter notes**, worksheets, agreements, books, records, letters, accounts, notes, summaries, forecasts, appraisals, surveys, estimates, diaries, desk calendars, reports, COMMUNICATIONS, correspondence, cablegrams, radiograms, facsimiles, printed electronic mail messages, telegrams, telexes, memoranda, summaries, notes and records of telephone conversations, meetings and conferences, notes in reference to personal conversations or interviews, ledgers, invoices, contracts, notices, drafts of ANY DOCUMENT, business records, charts, plans, specifications, schedules, diaries, computer printouts, computer stored data, computer tapes or computer disks, microfilm, microfiche, photographs, slides, negatives, motion pictures, video recordings, tape or other voice recordings and transcriptions thereof, data compilations from which information can be

obtained or translated and ANY other information contained on paper, in writing, in graphical media, in ANY computer readable media, or in ANY other physical form in your actual or constructive possession, custody or control.

- The term "DOCUMENT" shall mean any ESI, data, and metadata, content or communications, including messages, profiles, photographs, graphics, posts, text, timelines, tweets, pages, or any other information from accounts including but not limited to the following: Facebook, Myspace, Twitter, Instagram, LinkedIn, YouTube, Pinterest, Google Plus+, Tumblr, Reddit, Vine, Flickr, AskFM, and Snapchat and mobile applications ("apps") thereof, including any in which PLAINTIFFS are "tagged," mentioned, or otherwise identified on the social media of friends and acquaintances. The term "DOCUMENT" OR "DOCUMENTS" includes, without limitation, the original, whether or not the original is in your actual or constructive possession, custody or control, and all file copies and other copies that are not identical to the original no matter how (e.g., containing handwritten notations) or by whom prepared, and all drafts prepared in connection with ANY DOCUMENTS, whether used or not.
- "HANEY-RANGE LITIGATION" shall mean for the purpose of this notice, the civil lawsuits filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534 and *Haney, et al. v. Solmax International, Inc.*, Case No. 2012-7402 (consolidated at Case No. 2012-3534).
- "PLAINTIFF" shall mean for the purpose of this notice any of the named plaintiffs in the civil lawsuit filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534, including Stacey Haney, Harley Haney, Paige Haney, Beth Voyles, John Voyles, Ashley Voyles, Grace Kiskadden, and Loren Kiskadden.
- "SMITH BUTZ" shall mean for the purpose of this notice the law firm of Smith Butz, LLC, including Attorney John Smith, Attorney Kendra Smith, any and all other attorneys working at or for the law firm of Smith Butz, LLC, all staff and employees of the law firm of Smith Butz, LLC, and any agents and representatives thereof.
- "HANEY ALLEGHENY COUNTY LITIGATION" shall mean for the purpose of this notice, the civil lawsuit filed in Allegheny County, Pennsylvania at *Haney v. Center for Diabetes and Endocrine Health, et al.*, Case No. GD 16-001817.

- "GOLDBERG, KAMIN & GARVIN" shall mean for the purpose of this notice, the law firm of Goldberg, Kamin & Garvin, LLP, including Attorney Jonathan M. Kamin, Attorney David Wolf, Attorney Deborah R. Erbstein, all staff and employees of the law firm of Goldberg, Kamin & Garvin, LLP, and any agents and representatives thereof.
- "DISTRICT ATTORNEY VITTONE" shall mean for the purpose of this notice Eugene A. Vittone II, District Attorney, Washington County, Pennsylvania, and all staff and employees of the Office of the District Attorney of Washington County, Pennsylvania.
- "OFFICE OF ATTORNEY GENERAL" shall mean for the purpose of this notice the Pennsylvania Office of Attorney General, including Attorney General Joshua Shapiro, and all staff and employees of the Pennsylvania Office of Attorney General.
- "JANUARY 28 ARTICLE" shall mean for the purpose of this notice the article titled *State Conducting Criminal Investigation of Shale Gas Production*, David Templeton and Don Hopey, Pittsburgh Post-Gazette, Jan 28, 2019, https://www.post-gazette.com/news/crime-courts/2019/01/28/pa-attorney-general-josh-shapiro-criminal-investigation-oil-gas-industry-washington-county-environmental-crimes/stories/201901210078
- A request for information "REFERRING TO" (and/or ANY form thereof), "RELATING TO" (and/or ANY form thereof), "CONCERNING" (and/or ANY form thereof), "REGARDING" (and/or ANY form thereof), or "REFLECTING" (and/or ANY form thereof) a given subject matter shall be construed in the broadest sense and shall include information that, directly or indirectly, constitutes, embodies, comprises, reflects, represents, supports, contradicts, identifies, records, notes, mentions, states, refers to, refutes, reports upon, responds to, describes, discusses, studies, analyzes, evaluates, contains information concerning, or is in ANY way pertinent or relevant to that subject matter. *As indicated, the term necessarily includes information that is in opposition to as well as in support of YOUR position(s) and claim(s) in this action.*

## REQUESTED DOCUMENTS

1. Any and all DOCUMENTS REFLECTING, CONCERNING, OR REGARDING COMMUNICATIONS with any PLAINTIFF, their agent, attorney, or representative, including SMITH BUTZ and/or GOLDBERG, KAMIN & GARVIN, REGARDING the

HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, *Kiskadden v. Department of Environmental Protection*, Environmental Hearing Board Docket No. 2011-149-R, Commonwealth Court Docket No. 1167 CD 2015 and/or *Voyles v. Pennsylvania Department of Environmental Protection*, Commonwealth Court Docket No. 253 M.D. 2011, from January 1, 2012 to the present.

2. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 2 of the Post-Gazette's Petition including the statement that "The Post-Gazette learned that a civil complaint had been filed in the above-captioned case through various media coverage, including a January 28, 2019 article titled 'State conducting criminal investigation of shale gas production.'"

3. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 3 of the Post-Gazette's Petition, including the statement that "on June 15, 2018, a Motion and Order were 'filed under seal' by the Honorable Katherine B. Emery ("Judge Emery"). Again, on September 11, 2018, a Motion and Order were 'filed under seal' by Judge Emery."

4. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 5 of the Post-Gazette's Petition, specifically the statement that "Upon information and belief, the Post-Gazette has learned that a related proceeding is being heard before this Court on February 7, 2019 at 8:45 a.m."

5. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 6 of the Post-Gazette's Petition, including the statement that "the Post-Gazette has only recently been made aware of this matter."

6. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 33 of the Post-Gazette's Petition, including the statement that "Range Resources has no governmental interest."

7. Any and all DOCUMENTS referenced in the JANUARY 28 ARTICLE, cited in the Post-Gazette's Petition, ¶ 2, including but not limited to:

   (a) The "August 16, 2018 Letter to attorneys in a civil case" reportedly signed by Deputy Attorney General Courtney Butterfield, and "obtained recently by the Pittsburgh Post-Gazette";

   (b) The September 8, 2018 letter sent from a "resident" to DISTRICT ATTORNEY VITTONE, "asking him to investigate the 'many individuals and companies involved in his situation'";

   (c) The September 13, 2018 letter from DISTRICT ATTORNEY VITTONE to the "resident", reportedly "noting limited jurisdiction" and that DISTRICT ATTORNEY VITTONE was "forwarding a copy of your letter to Acting Chief Deputy Attorney General Rebecca Franz";

8. COMMUNICATIONS between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

9. Any DOCUMENTS RELATING TO the "arrangement" between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

10. Any COMMUNICATIONS between Washington County residents and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

11. Any DOCUMENTS RELATED TO the May 2017 meeting between the OFFICE OF ATTORNEY GENERAL wherein "17 people from as many as seven counties aired

complaints about the shale gas industry," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

12. Any DOCUMENTS RELATED TO the meeting "Late in May 2017" wherein "[Attorney General] Shapiro and AG investigators met in Pittsburgh with representatives from environmental advocacy groups," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

13. Any COMMUNICATIONS between YOU and June Chappel, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

14. Any COMMUNICATIONS between YOU and any of the "[t]hree others [who] have met with investigators and say they are willing to testify," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

15. Any DOCUMENTS RELATED TO or REFLECTING that "the AG's letter was introduced as an exhibit during an August court hearing" in the HANEY-RANGE LITIGATION as reported in the JANUARY 28 ARTICLE.

16. Any DOCUMENTS (the definition of which expressly includes "reporter notes") REGARDING the HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, and/or efforts by Stacey Haney, GOLDBERG, KAMIN & GARVIN, and/or SMITH BUTZ to unseal court records and/or publicly or otherwise further disclose the confidential settlement agreement reached in the HANEY-RANGE LITIGATION.

17. Any order, opinion, filing, or transcript RELATING TO any civil, criminal or administrative proceeding that was marked on that proceeding's docket as settled, closed, or final judgment entered at the time in which PG Publishing Company d/b/a The

Pittsburgh Post-Gazette sought to intervene from 1950 to the present, excluding the present matter.

**EXHIBIT B TO NOTICE OF DEPOSITION DUCES TECUM TO PG PUBLISHING CO. D/B/A PITTSBURGH POST-GAZETTE**

Per Rule 4007.1(e), Range Resources – Appalachia, LLC will depose the corporate designee of PG Publishing Company d/b/a The Pittsburgh Post-Gazette ("the Post-Gazette") on the topics identified below. The Post-Gazette has a duty to designate "one of more officers, directors, or management agents, or other persons who consent to testify on its behalf" as to the following matters:

**DEFINITIONS**

The definitions of terms as described in Exhibit A hereto shall apply to the below Topics.

**TOPICS**

1. The factual basis of the allegations contained in the Pittsburgh Post-Gazette's Emergency Petition to Intervene and To Unseal Record, filed on February 7, 2019; including, but not limited to, the following allegations:

   (a) Paragraph 2 of the Post-Gazette's Petition, stating, in part, that "The Post-Gazette learned that a civil complaint had been filed in the above-captioned case through various media coverage, including a January 28, 2019 article titled 'State conducting criminal investigation of shale gas production.'"

   (b) Paragraph 3 of the Post-Gazette's Petition, stating that "on June 15, 2018, a Motion and Order were 'filed under seal' by the Honorable Katherine B. Emery ("Judge Emery"). Again, on September 11, 2018, a Motion and Order were 'filed under seal' by Judge Emery."

   (c) Paragraph 5 of the Post-Gazette's Petition, stating that "Upon information and belief, the Post-Gazette has learned that a related proceeding is being heard before this Court on February 7, 2019 at 8:45 a.m."

   (d) Paragraph 6 of The Post-Gazette's Petition, stating that "the Post-Gazette has only recently been made aware of this matter."

   (e) Paragraph 33 of the Post-Gazette's Petition, stating that "Range Resources has no governmental interest," and "this case involves allegations of

Range Resources, a publicly traded Texas based corporation, having caused spills and leaks of toxic chemicals that resulted in serious health issues, property damage, and water pollution to land owners in Washington County."

2. The POST-GAZETTE'S knowledge of the facts reported the JANUARY 28 ARTICLE, as referenced in the Post-Gazette's Petition, ¶ 2.

3. The POST-GAZETTE'S knowledge of the following DOCUMENTS or COMMUNICATIONS referenced in the JANUARY 28 ARTICLE:

(a) The "August 16, 2018 Letter to Attorneys in a Civil Case" signed by Deputy Attorney General Courtney Butterfield, and "obtained recently by the Pittsburgh Post-Gazette";

(b) The September 8, 2018 letter sent from a "resident" to Washington County District Attorney Vittone ("DISTRICT ATTORNEY VITTONE"), "asking him to investigate the 'many individuals and companies involved in his situation'";

(c) The September 13, 2018 letter from DISTRICT ATTORNEY VITTONE to the "resident", among other things, "noting limited jurisdiction" and that DISTRICT ATTORNEY VITTONE was "forwarding a copy of your letter to Acting Chief Deputy Attorney General Rebecca Franz";

(d) COMMUNICATIONS between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL;

(e) Any DOCUMENTS RELATED TO the "arrangement" between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL;

(f) Any COMMUNICATION between Washington County residents and the OFFICE OF ATTORNEY GENERAL, as referenced in this article;

(g) Any DOCUMENTS RELATED TO the May 2017 meeting between the OFFICE OF ATTORNEY GENERAL wherein "17 people from as many as seven counties aired complaints about the shale gas industry"

(h) Any DOCUMENTS RELATED TO the meeting "Late in May 2017" wherein "[Attorney General] Shapiro and AG investigators met in Pittsburgh with representatives from environmental advocacy groups"

(i) Any COMMUNICATIONS between YOU and June Chappel, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE;

(j) Any COMMUNICATIONS between YOU and "[t]hree others [persons who] have met with investigators and say they are willing to testify," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE;

(k) Any DOCUMENTS RELATED TO or REFLECTING that "the AG's letter was introduced as an exhibit during an August court hearing" in the HANEY-RANGE LITIGATION as reported in the JANUARY 28 ARTICLE.

4. The date and manner of the POST-GAZETTE'S receipt of the DOCUMENTS listed in Topic No. 3, *supra*.

5. The POST-GAZETTE'S knowledge of the facts contained in DOCUMENTS or COMMUNICATIONS listed in Topic No. 3, *supra*.

6. COMMUNICATIONS between the POST-GAZETTE, and any of the named PLAINTIFFS or their attorneys or representatives, including but not limited to SMITH BUTZ and/or GOLDBERG, KAMIN & GARVIN, RELATING TO any of the following matters:

(a) the HANEY-RANGE LITIGATION;

(b) the HANEY ALLEGHENY COUNTY LITIGATION

(c) *Kiskadden v. Department of Environmental Protection*, Environmental Hearing Board Docket No. 2011-149-R; Commonwealth Court Docket No. 1167 CD 2015;

(d) *Voyles v. Pennsylvania Department of Environmental Protection*, Commonwealth Court Docket No. 253 M.D. 2011; and/or

(e) the matters reported in *State Conducting Criminal Investigation of Shale Gas Production*, Don Hopey and David Templeton, Pittsburgh Post-Gazette, Jan 28, 2019, https://www.post-gazette.com/news/crime-courts/2019/01/28/pa-attorney-general-josh-shapiro-criminal-

investigation-oil-gas-industry-washington-county-environmental-crimes/stories/201901210078, as referenced in the Post-Gazette's Petition, ¶ 2.

7. The POST-GAZETTE'S reporting and editorial oversight practice and procedures including but not limited to document retention policies.

8. The POST-GAZETTE'S efforts to collect DOCUMENTS and respond to subpoenas or discovery requests RELATED TO the Post Gazette's Petition.

9. The existence of and the parties to any confidential settlement agreement or release entered by the POST-GAZETTE.

# EXHIBIT 3

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF Washington

Stacey Haney, et al.,
Plaintiffs
v.
Range Resources-Appalachia, LLC, et al.
Defendants

File No. 2012-35534

SUBPOENA TO ATTEND AND TESTIFY

TO: Sally Stapleton c/o Frederick N. Frank, Esq. 707 Grant Street, Suite 3300 Pittsburgh, PA 15219

1. You are ordered by the court to come to Jones Day 500 Grant Street, Suite 4500

(Specify courtroom or other place)

at Pittsburgh, Allegheny County, Pennsylvania, on March 12, 2019 at 9:00 o'clock, A. M., to testify on behalf of Defendants

in the above case, and to remain until excused.

2. And bring with you the following: Please see attached Exhibit A

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

REQUESTED BY A PARTY/ATTORNEY IN COMPLIANCE WITH Pa.R.C.P. No. 234.2(a):
NAME: Kimberly A. Brown, Esq.
ADDRESS: 500 Grant Street, Suite 4500
Pittsburgh, PA 15219
TELEPHONE: 412-391-3939
SUPREME COURT ID # 56200

BY THE COURT:

Joy Schury Ranko (ta)
Prothonotary/Clerk, Civil Division

Date:

Seal of the Court

Sandra D. Bedillion (ta)
Deputy

JOY SCHURY RANKO, PROTHONOTARY
My Term Expires First Monday in January, 2020

OFFICIAL NOTE: This form of subpoena shall be used whenever a subpoena is issuable, including hearings in connection with depositions and before arbitrators, masters, commissioners, etc. in compliance with Pa.R.C.P. No. 234.1. If a subpoena for production of documents, records or things is desired, complete paragraph 2.

**EXHIBIT A TO NOTICE OF DEPOSITION DUCES TECUM OF SALLY STAPLETON**

**DEFINITIONS**

- "SALLY STAPLETON" or "YOU" or "YOUR" shall mean for the purpose of this notice Sally Stapleton, personally, and all of her servants, agents, employees or other representatives.
- The "POST-GAZETTE" shall mean for the purpose of this notice PG Publishing Company d/b/a The Pittsburgh Post-Gazette, and its employees, agents and representatives.
- The "Post-Gazette's Petition" or "Petition" shall mean the document titled "Emergency Petition to Intervene and to Unseal Record" filed in the HANEY-RANGE LITIGATION on February 7, 2019.
- "COMMUNICATION" or "COMMUNICATE" shall mean for the purpose of this notice ANY act or instance whereby messages, facts, opinions, data or ANY other information is transmitted orally, visually, in writing, electronically or by ANY other means or media from one or more persons to one or more other persons and shall include the transmission, the messages, facts, opinions, data or other information transmitted, and the process by which the transmission was effected.
- "DOCUMENT" shall be an all-inclusive term that shall be used in its broadest sense and is to include ANY medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the following, whether printed. typewritten, recorded, filmed or reproduced by ANY mechanical process or written or produced by hand, *and whether an original, master or copy*, and whether or not claimed to be privileged from discovery, namely: **reporter notes**, worksheets, agreements, books, records, letters, accounts, notes, summaries, forecasts, appraisals, surveys, estimates, diaries, desk calendars, reports, COMMUNICATIONS, correspondence, cablegrams, radiograms, facsimiles, printed electronic mail messages, telegrams, telexes, memoranda, summaries, notes and records of telephone conversations, meetings and conferences, notes in reference to personal conversations or interviews, ledgers, invoices, contracts, notices, drafts of ANY DOCUMENT, business records, charts, plans, specifications, schedules, diaries, computer printouts, computer stored data, computer tapes or computer

disks, microfilm, microfiche, photographs, slides, negatives, motion pictures, video recordings, tape or other voice recordings and transcriptions thereof, data compilations from which information can be obtained or translated and ANY other information contained on paper, in writing, in graphical media, in ANY computer readable media, or in ANY other physical form in your actual or constructive possession, custody or control.

- The term "DOCUMENT" shall mean any ESI, data, and metadata, content or communications, including messages, profiles, photographs, graphics, posts, text, timelines, tweets, pages, or any other information from accounts including but not limited to the following: Facebook, Myspace, Twitter, Instagram, LinkedIn, YouTube, Pinterest, Google Plus+, Tumblr, Reddit, Vine, Flickr, AskFM, and Snapchat and mobile applications ("apps") thereof, including any in which PLAINTIFFS are "tagged," mentioned, or otherwise identified on the social media of friends and acquaintances. The term "DOCUMENT" OR "DOCUMENTS" includes, without limitation, the original, whether or not the original is in your actual or constructive possession, custody or control, and all file copies and other copies that are not identical to the original no matter how [e.g., containing handwritten notations] or by whom prepared, and all drafts prepared in connection with ANY DOCUMENTS, whether used or not.
- "HANEY-RANGE LITIGATION" shall mean for the purpose of this notice, the civil lawsuits filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534 and *Haney, et al. v. Solmax International, Inc.*, Case No. 2012-7402 (consolidated at Case No. 2012-3534).
- "PLAINTIFF" shall mean for the purpose of this notice any of the named plaintiffs in the civil lawsuit filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534, including Stacey Haney, Harley Haney, Paige Haney, Beth Voyles, John Voyles, Ashley Voyles, Grace Kiskadden, and Loren Kiskadden.
- "SMITH BUTZ" shall mean for the purpose of this notice the law firm of Smith Butz, LLC, including Attorney John Smith, Attorney Kendra Smith, any and all other attorneys working at or for the law firm of Smith Butz, LLC, all staff and employees of the law firm of Smith Butz, LLC, and any agents and representatives thereof.

- "HANEY ALLEGHENY COUNTY LITIGATION" shall mean for the purpose of this notice, the civil lawsuit filed in Allegheny County, Pennsylvania at *Haney v. Center for Diabetes and Endocrine Health, et al.*, Case No. GD 16-001817.
- "GOLDBERG, KAMIN & GARVIN" shall mean for the purpose of this notice, the law firm of Goldberg, Kamin & Garvin, LLP, including Attorney Jonathan M. Kamin, Attorney David Wolf, Attorney Deborah R. Erbstein, all staff and employees of the law firm of Goldberg, Kamin & Garvin, LLP, and any agents and representatives thereof.
- "DISTRICT ATTORNEY VITTONE" shall mean for the purpose of this notice Eugene A. Vittone II, District Attorney, Washington County, Pennsylvania, and all staff and employees of the Office of the District Attorney of Washington County, Pennsylvania.
- "OFFICE OF ATTORNEY GENERAL" shall mean for the purpose of this notice the Pennsylvania Office of Attorney General, including Attorney General Joshua Shapiro, and all staff and employees of the Pennsylvania Office of Attorney General.
- "JANUARY 28 ARTICLE" shall mean for the purpose of this notice the article titled *State Conducting Criminal Investigation of Shale Gas Production*, David Templeton and Don Hopey, Pittsburgh Post-Gazette, Jan 28, 2019, https://www.post-gazette.com/news/crime-courts/2019/01/28/pa-attorney-general-josh-shapiro-criminal-investigation-oil-gas-industry-washington-county-environmental-crimes/stories/201901210078
- A request for information "REFERRING TO" (and/or ANY form thereof), "RELATING TO" (and/or ANY form thereof), "CONCERNING" (and/or ANY form thereof), "REGARDING" (and/or ANY form thereof), or "REFLECTING" (and/or ANY form thereof) a given subject matter shall be construed in the broadest sense and shall include information that, directly or indirectly, constitutes, embodies, comprises, reflects, represents, supports, contradicts, identifies, records, notes, mentions, states, refers to, refutes, reports upon, responds to, describes, discusses, studies, analyzes, evaluates, contains information concerning, or is in ANY way pertinent or relevant to that subject matter. *As indicated, the term necessarily includes information that is in opposition to as well as in support of YOUR position(s) and claim(s) in this action.*

## REQUESTED DOCUMENTS

1. Any and all DOCUMENTS REFLECTING, CONCERNING, OR REGARDING COMMUNICATIONS with any PLAINTIFF, their agent, attorney, or representative, including SMITH BUTZ and/or GOLDBERG, KAMIN & GARVIN, REGARDING the HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, *Kiskadden v. Department of Environmental Protection*, Environmental Hearing Board Docket No. 2011-149-R, Commonwealth Court Docket No. 1167 CD 2015 and/or *Voyles v. Pennsylvania Department of Environmental Protection*, Commonwealth Court Docket No. 253 M.D. 2011, from January 1, 2012 to the present.

2. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 2 of the Post-Gazette's Petition including the statement that "The Post-Gazette learned that a civil complaint had been filed in the above-captioned case through various media coverage, including a January 28, 2019 article titled 'State conducting criminal investigation of shale gas production.'"

3. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 3 of the Post-Gazette's Petition, including the statement that "on June 15, 2018, a Motion and Order were 'filed under seal' by the Honorable Katherine B. Emery ("Judge Emery"). Again, on September 11, 2018, a Motion and Order were 'filed under seal' by Judge Emery."

4. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 5 of the Post-Gazette's Petition, specifically the statement that "Upon information and belief, the Post-Gazette has learned that a related proceeding is being heard before this Court on February 7, 2019 at 8:45 a.m."

5. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 6 of the Post-Gazette's Petition, including the statement that "the Post-Gazette has only recently been made aware of this matter."

6. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 33 of the Post-Gazette's Petition, including the statement that "Range Resources has no governmental interest."

7. Any and all DOCUMENTS referenced in the JANUARY 28 ARTICLE, cited in the Post-Gazette's Petition, ¶ 2, including but not limited to:

   (a) The "August 16, 2018 Letter to attorneys in a civil case" reportedly signed by Deputy Attorney General Courtney Butterfield, and "obtained recently by the Pittsburgh Post-Gazette";

   (b) The September 8, 2018 letter sent from a "resident" to DISTRICT ATTORNEY VITTONE, "asking him to investigate the 'many individuals and companies involved in his situation'";

   (c) The September 13, 2018 letter from DISTRICT ATTORNEY VITTONE to the "resident", reportedly "noting limited jurisdiction" and that DISTRICT ATTORNEY VITTONE was "forwarding a copy of your letter to Acting Chief Deputy Attorney General Rebecca Franz";

8. COMMUNICATIONS between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

9. Any DOCUMENTS RELATING TO the "arrangement" between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

10. Any COMMUNICATIONS between Washington County residents and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

11. Any DOCUMENTS RELATED TO the May 2017 meeting between the OFFICE OF ATTORNEY GENERAL wherein "17 people from as many as seven counties aired complaints about the shale gas industry," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

12. Any DOCUMENTS RELATED TO the meeting "Late in May 2017" wherein "[Attorney General] Shapiro and AG investigators met in Pittsburgh with representatives from environmental advocacy groups," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

13. Any COMMUNICATIONS between YOU and June Chappel, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

14. Any COMMUNICATIONS between YOU and any of the "[t]hree others [who] have met with investigators and say they are willing to testify," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

15. Any DOCUMENTS RELATED TO or REFLECTING that "the AG's letter was introduced as an exhibit during an August court hearing" in the HANEY-RANGE LITIGATION as reported in the JANUARY 28 ARTICLE.

16. Any DOCUMENTS (the definition of which expressly includes "reporter notes") REGARDING the HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, and/or efforts by Stacey Haney, GOLDBERG, KAMIN & GARVIN, and/or SMITH BUTZ to unseal court records and/or publicly or otherwise further disclose the confidential settlement agreement reached in the HANEY-RANGE LITIGATION.

17. Any order, opinion, filing, or transcript RELATING TO any civil, criminal or administrative proceeding that was marked on that proceeding's docket as settled, closed, or final judgment entered at the time in which PG Publishing Company d/b/a The Pittsburgh Post-Gazette sought to intervene from 1950 to the present, excluding the present matter.

# EXHIBIT 4

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF Washington

Stacey Haney, et al.,
Plaintiffs

v.

Range Resources-Appalachia, LLC, et al.,
Defendants

File No. 2012-35341

**SUBPOENA TO ATTEND AND TESTIFY**

TO: Dan Hopey c/o Frederick N. Frank, Esq. 707 Grant Street, Suite 3300 Pittsburgh, PA 15219

1. You are ordered by the court to come to Jones Day 500 Grant Street, Suite 4500

(Specify courtroom or other place)

at Pittsburgh, Allegheny County, Pennsylvania, on March 12, 2019 at 11:00 o'clock, A. M., to testify on behalf of himself

in the above case, and to remain until excused.

2. And bring with you the following: Please see attached Exhibit A

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

REQUESTED BY A PARTY/ATTORNEY IN COMPLIANCE WITH Pa.R.C.P. No. 234.2(a):
NAME: Kimberly A. Brown, Esq.
ADDRESS: 500 Grant Street, Suite 4500
Pittsburgh, PA 15219
TELEPHONE: 412-391-3939
SUPREME COURT ID # 56200

BY THE COURT:

Joy Schury Ranko (ts)
Prothonotary/Clerk, Civil Division

Date:

Seal of the Court

Sandra D. Bedillion (ts)
JOY SCHURY RANKO, PROTHONOTARY
My Term Expires First Monday in January, 2020

OFFICIAL NOTE: This form of subpoena shall be used whenever a subpoena is issuable, including hearings in connection with depositions and before arbitrators, masters, commissioners, etc. in compliance with Pa.R.C.P. No. 234.1. If a subpoena for production of documents, records or things is desired, complete paragraph 2.

**EXHIBIT A TO NOTICE OF DEPOSITION DUCES TECUM OF DON HOPEY**

**DEFINITIONS**

- "DON HOPEY" or "YOU" or "YOUR" shall mean for the purpose of this notice Don Hopey, personally, and all of his servants, agents, or other representatives.
- The "POST-GAZETTE" shall mean for the purpose of this notice PG Publishing Company d/b/a The Pittsburgh Post-Gazette, and its employees, agents and representatives.
- The "Post-Gazette's Petition" or "Petition" shall mean the document titled "Emergency Petition to Intervene and to Unseal Record" filed in the HANEY-RANGE LITIGATION on February 7, 2019.
- "COMMUNICATION" or "COMMUNICATE" shall mean for the purpose of this notice ANY act or instance whereby messages, facts, opinions, data or ANY other information is transmitted orally, visually, in writing, electronically or by ANY other means or media from one or more persons to one or more other persons and shall include the transmission, the messages, facts, opinions, data or other information transmitted, and the process by which the transmission was effected.
- "DOCUMENT" shall be an all-inclusive term that shall be used in its broadest sense and is to include ANY medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the following, whether printed. typewritten, recorded, filmed or reproduced by ANY mechanical process or written or produced by hand, *and whether an original, master or copy*, and whether or not claimed to be privileged from discovery, namely: **reporter notes**, worksheets, agreements, books, records, letters, accounts, notes, summaries, forecasts, appraisals, surveys, estimates, diaries, desk calendars, reports, COMMUNICATIONS, correspondence, cablegrams, radiograms, facsimiles, printed electronic mail messages, telegrams, telexes, memoranda, summaries, notes and records of telephone conversations, meetings and conferences, notes in reference to personal conversations or interviews, ledgers, invoices, contracts, notices, drafts of ANY DOCUMENT, business records, charts, plans, specifications, schedules, diaries, computer printouts, computer stored data, computer tapes or computer disks, microfilm, microfiche, photographs, slides, negatives, motion pictures, video

recordings, tape or other voice recordings and transcriptions thereof, data compilations from which information can be obtained or translated and ANY other information contained on paper, in writing, in graphical media, in ANY computer readable media, or in ANY other physical form in your actual or constructive possession, custody or control.

- The term "DOCUMENT" shall mean any ESI, data, and metadata, content or communications, including messages, profiles, photographs, graphics, posts, text, timelines, tweets, pages, or any other information from accounts including but not limited to the following: Facebook, Myspace, Twitter, Instagram, LinkedIn, YouTube, Pinterest, Google Plus+, Tumblr, Reddit, Vine, Flickr, AskFM, and Snapchat and mobile applications ("apps") thereof, including any in which PLAINTIFFS are "tagged," mentioned, or otherwise identified on the social media of friends and acquaintances. The term "DOCUMENT" OR "DOCUMENTS" includes, without limitation, the original, whether or not the original is in your actual or constructive possession, custody or control, and all file copies and other copies that are not identical to the original no matter how [e.g., containing handwritten notations] or by whom prepared, and all drafts prepared in connection with ANY DOCUMENTS, whether used or not.
- "HANEY-RANGE LITIGATION" shall mean for the purpose of this notice, the civil lawsuits filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534 and *Haney, et al. v. Solmax International, Inc.*, Case No. 2012-7402 (consolidated at Case No. 2012-3534).
- "PLAINTIFF" shall mean for the purpose of this notice any of the named plaintiffs in the civil lawsuit filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534, including Stacey Haney, Harley Haney, Paige Haney, Beth Voyles, John Voyles, Ashley Voyles, Grace Kiskadden, and Loren Kiskadden.
- "SMITH BUTZ" shall mean for the purpose of this notice the law firm of Smith Butz, LLC, including Attorney John Smith, Attorney Kendra Smith, any and all other attorneys working at or for the law firm of Smith Butz, LLC, all staff and employees of the law firm of Smith Butz, LLC, and any agents and representatives thereof.

- "HANEY ALLEGHENY COUNTY LITIGATION" shall mean for the purpose of this notice, the civil lawsuit filed in Allegheny County, Pennsylvania at *Haney v. Center for Diabetes and Endocrine Health, et al.*, Case No. GD 16-001817.
- "GOLDBERG, KAMIN & GARVIN" shall mean for the purpose of this notice, the law firm of Goldberg, Kamin & Garvin, LLP, including Attorney Jonathan M. Kamin, Attorney David Wolf, Attorney Deborah R. Erbstein, all staff and employees of the law firm of Goldberg, Kamin & Garvin, LLP, and any agents and representatives thereof.
- "DISTRICT ATTORNEY VITTONE" shall mean for the purpose of this notice Eugene A. Vittone II, District Attorney, Washington County, Pennsylvania, and all staff and employees of the Office of the District Attorney of Washington County, Pennsylvania.
- "OFFICE OF ATTORNEY GENERAL" shall mean for the purpose of this notice the Pennsylvania Office of Attorney General, including Attorney General Joshua Shapiro, and all staff and employees of the Pennsylvania Office of Attorney General.
- "JANUARY 28 ARTICLE" shall mean for the purpose of this notice the article titled *State Conducting Criminal Investigation of Shale Gas Production*, David Templeton and Don Hopey, Pittsburgh Post-Gazette, Jan 28, 2019, https://www.post-gazette.com/news/crime-courts/2019/01/28/pa-attorney-general-josh-shapiro-criminal-investigation-oil-gas-industry-washington-county-environmental-crimes/stories/201901210078
- A request for information "REFERRING TO" (and/or ANY form thereof), "RELATING TO" (and/or ANY form thereof), "CONCERNING" (and/or ANY form thereof), "REGARDING" (and/or ANY form thereof), or "REFLECTING" (and/or ANY form thereof) a given subject matter shall be construed in the broadest sense and shall include information that, directly or indirectly, constitutes, embodies, comprises, reflects, represents, supports, contradicts, identifies, records, notes, mentions, states, refers to, refutes, reports upon, responds to, describes, discusses, studies, analyzes, evaluates, contains information concerning, or is in ANY way pertinent or relevant to that subject matter. ***As indicated, the term necessarily includes information that is in opposition to as well as in support of YOUR position(s) and claim(s) in this action.***

## REQUESTED DOCUMENTS

1. Any and all DOCUMENTS REFLECTING, CONCERNING, OR REGARDING COMMUNICATIONS with any PLAINTIFF, their agent, attorney, or representative, including SMITH BUTZ and/or GOLDBERG, KAMIN & GARVIN, REGARDING the HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, *Kiskadden v. Department of Environmental Protection*, Environmental Hearing Board Docket No. 2011-149-R, Commonwealth Court Docket No. 1167 CD 2015 and/or *Voyles v. Pennsylvania Department of Environmental Protection*, Commonwealth Court Docket No. 253 M.D. 2011, from January 1, 2012 to the present.

2. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 2 of the Post-Gazette's Petition including the statement that "The Post-Gazette learned that a civil complaint had been filed in the above-captioned case through various media coverage, including a January 28, 2019 article titled 'State conducting criminal investigation of shale gas production.'"

3. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 3 of the Post-Gazette's Petition, including the statement that "on June 15, 2018, a Motion and Order were 'filed under seal' by the Honorable Katherine B. Emery ("Judge Emery"). Again, on September 11, 2018, a Motion and Order were 'filed under seal' by Judge Emery."

4. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 5 of the Post-Gazette's Petition, specifically the statement that "Upon information and belief, the Post-Gazette has learned that a related proceeding is being heard before this Court on February 7, 2019 at 8:45 a.m."

5. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 6 of the Post-Gazette's Petition, including the statement that "the Post-Gazette has only recently been made aware of this matter."

6. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 33 of the Post-Gazette's Petition, including the statement that "Range Resources has no governmental interest."

7. Any and all DOCUMENTS referenced in the JANUARY 28 ARTICLE, cited in the Post-Gazette's Petition, ¶ 2, including but not limited to:

   (a) The "August 16, 2018 Letter to attorneys in a civil case" reportedly signed by Deputy Attorney General Courtney Butterfield, and "obtained recently by the Pittsburgh Post-Gazette";

   (b) The September 8, 2018 letter sent from a "resident" to DISTRICT ATTORNEY VITTONE, "asking him to investigate the 'many individuals and companies involved in his situation'";

   (c) The September 13, 2018 letter from DISTRICT ATTORNEY VITTONE to the "resident", reportedly "noting limited jurisdiction" and that DISTRICT ATTORNEY VITTONE was "forwarding a copy of your letter to Acting Chief Deputy Attorney General Rebecca Franz";

8. COMMUNICATIONS between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

9. Any DOCUMENTS RELATING TO the "arrangement" between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

10. Any COMMUNICATIONS between Washington County residents and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

11. Any DOCUMENTS RELATED TO the May 2017 meeting between the OFFICE OF ATTORNEY GENERAL wherein "17 people from as many as seven counties aired complaints about the shale gas industry," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

12. Any DOCUMENTS RELATED TO the meeting "Late in May 2017" wherein "[Attorney General] Shapiro and AG investigators met in Pittsburgh with representatives from environmental advocacy groups," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

13. Any COMMUNICATIONS between YOU and June Chappel, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

14. Any COMMUNICATIONS between YOU and any of the "[t]hree others [who] have met with investigators and say they are willing to testify," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

15. Any DOCUMENTS RELATED TO or REFLECTING that "the AG's letter was introduced as an exhibit during an August court hearing" in the HANEY-RANGE LITIGATION as reported in the JANUARY 28 ARTICLE.

16. Any DOCUMENTS (the definition of which expressly includes "reporter notes") REGARDING the HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, and/or efforts by Stacey Haney, GOLDBERG, KAMIN & GARVIN, and/or SMITH BUTZ to unseal court records and/or publicly or otherwise further disclose the confidential settlement agreement reached in the HANEY-RANGE LITIGATION.

17. Any order, opinion, filing, or transcript RELATING TO any civil, criminal or administrative proceeding that was marked on that proceeding's docket as settled, closed, or final judgment entered at the time in which PG Publishing Company d/b/a The Pittsburgh Post-Gazette sought to intervene from 1950 to the present, excluding the present matter.

# EXHIBIT 5

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF Washington

Stacey Haney, et al.,
Plaintiffs
v.
Range Resources-Appalachia, LLC, et al.,
Defendants

File No. 2012-3534

**SUBPOENA TO ATTEND AND TESTIFY**

TO: David Templeton c/o Frederick N. Frank, Esq. 707 Grant Street, Suite 3300 Pittsburgh, PA. 15219

1. You are ordered by the court to come to Jones Day 500 Grant Street, Suite 4500

(Specify courtroom or other place)

at Pittsburgh, Allegheny County, Pennsylvania, on March 12, 2019 at 2:00 o'clock, P. M., to testify on behalf of himself

in the above case, and to remain until excused.

2. And bring with you the following: Please see attached Exhibit A

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

REQUESTED BY A PARTY/ATTORNEY IN COMPLIANCE WITH Pa.R.C.P. No. 234.2(a):
NAME: Kimberly A. Brown, Esq.
ADDRESS: 500 Grant Street, Suite 4500
Pittsburgh, PA 15219
TELEPHONE: 412-391-3939
SUPREME COURT ID # 56800

BY THE COURT:

Joy Schury Ranko (ts)
Prothonotary/Clerk, Civil Division

Date:
Seal of the Court

Sandra D. Bedillion (ts)
Deputy

JOY SCHURY RANKO, PROTHONOTARY
My Term Expires First Monday in January, 2020

OFFICIAL NOTE: This form of subpoena shall be used whenever a subpoena is issuable, including hearings in connection with depositions and before arbitrators, masters, commissioners, etc. in compliance with Pa.R.C.P. No. 234.1. If a subpoena for production of documents, records or things is desired, complete paragraph 2.

**EXHIBIT A TO NOTICE OF DEPOSITION DUCES TECUM OF DAVID TEMPLETON**

**DEFINITIONS**

- "DAVID TEMPLETON" or "YOU" or "YOUR" shall mean for the purpose of this notice David Templeton, personally, and all of his servants, agents, or other representatives.
- The "POST-GAZETTE" shall mean for the purpose of this notice PG Publishing Company d/b/a The Pittsburgh Post-Gazette, and its employees, agents and representatives.
- The "Post-Gazette's Petition" or "Petition" shall mean the document titled "Emergency Petition to Intervene and to Unseal Record" filed in the HANEY-RANGE LITIGATION on February 7, 2019.
- "COMMUNICATION" or "COMMUNICATE" shall mean for the purpose of this notice ANY act or instance whereby messages, facts, opinions, data or ANY other information is transmitted orally, visually, in writing, electronically or by ANY other means or media from one or more persons to one or more other persons and shall include the transmission, the messages, facts, opinions, data or other information transmitted, and the process by which the transmission was effected.
- "DOCUMENT" shall be an all-inclusive term that shall be used in its broadest sense and is to include ANY medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the following, whether printed. typewritten, recorded, filmed or reproduced by ANY mechanical process or written or produced by hand, *and whether an original, master or copy*, and whether or not claimed to be privileged from discovery, namely: **reporter notes**, worksheets, agreements, books, records, letters, accounts, notes, summaries, forecasts, appraisals, surveys, estimates, diaries, desk calendars, reports, COMMUNICATIONS, correspondence, cablegrams, radiograms, facsimiles, printed electronic mail messages, telegrams, telexes, memoranda, summaries, notes and records of telephone conversations, meetings and conferences, notes in reference to personal conversations or interviews, ledgers, invoices, contracts, notices, drafts of ANY DOCUMENT, business records, charts, plans, specifications, schedules, diaries, computer printouts, computer stored data, computer tapes or computer

disks, microfilm, microfiche, photographs, slides, negatives, motion pictures, video recordings, tape or other voice recordings and transcriptions thereof, data compilations from which information can be obtained or translated and ANY other information contained on paper, in writing, in graphical media, in ANY computer readable media, or in ANY other physical form in your actual or constructive possession, custody or control.

- The term "DOCUMENT" shall mean any ESI, data, and metadata, content or communications, including messages, profiles, photographs, graphics, posts, text, timelines, tweets, pages, or any other information from accounts including but not limited to the following: Facebook, Myspace, Twitter, Instagram, LinkedIn, YouTube, Pinterest, Google Plus+, Tumblr, Reddit, Vine, Flickr, AskFM, and Snapchat and mobile applications ("apps") thereof, including any in which PLAINTIFFS are "tagged," mentioned, or otherwise identified on the social media of friends and acquaintances. The term "DOCUMENT" OR "DOCUMENTS" includes, without limitation, the original, whether or not the original is in your actual or constructive possession, custody or control, and all file copies and other copies that are not identical to the original no matter how [e.g., containing handwritten notations] or by whom prepared, and all drafts prepared in connection with ANY DOCUMENTS, whether used or not.
- "HANEY-RANGE LITIGATION" shall mean for the purpose of this notice, the civil lawsuits filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534 and *Haney, et al. v. Solmax International, Inc.*, Case No. 2012-7402 (consolidated at Case No. 2012-3534).
- "PLAINTIFF" shall mean for the purpose of this notice any of the named plaintiffs in the civil lawsuit filed in Washington County, Pennsylvania at *Haney, et al. v. Range Resources Appalachia, LLC, et al.*, Case No. 2012-3534, including Stacey Haney, Harley Haney, Paige Haney, Beth Voyles, John Voyles, Ashley Voyles, Grace Kiskadden, and Loren Kiskadden.
- "SMITH BUTZ" shall mean for the purpose of this notice the law firm of Smith Butz, LLC, including Attorney John Smith, Attorney Kendra Smith, any and all other attorneys working at or for the law firm of Smith Butz, LLC, all staff and employees of the law firm of Smith Butz, LLC, and any agents and representatives thereof.

- "HANEY ALLEGHENY COUNTY LITIGATION" shall mean for the purpose of this notice, the civil lawsuit filed in Allegheny County, Pennsylvania at *Haney v. Center for Diabetes and Endocrine Health, et al.*, Case No. GD 16-001817.
- "GOLDBERG, KAMIN & GARVIN" shall mean for the purpose of this notice, the law firm of Goldberg, Kamin & Garvin, LLP, including Attorney Jonathan M. Kamin, Attorney David Wolf, Attorney Deborah R. Erbstein, all staff and employees of the law firm of Goldberg, Kamin & Garvin, LLP, and any agents and representatives thereof.
- "DISTRICT ATTORNEY VITTONE" shall mean for the purpose of this notice Eugene A. Vittone II, District Attorney, Washington County, Pennsylvania, and all staff and employees of the Office of the District Attorney of Washington County, Pennsylvania.
- "OFFICE OF ATTORNEY GENERAL" shall mean for the purpose of this notice the Pennsylvania Office of Attorney General, including Attorney General Joshua Shapiro, and all staff and employees of the Pennsylvania Office of Attorney General.
- "JANUARY 28 ARTICLE" shall mean for the purpose of this notice the article titled *State Conducting Criminal Investigation of Shale Gas Production*, David Templeton and Don Hopey, Pittsburgh Post-Gazette, Jan 28, 2019, https://www.post-gazette.com/news/crime-courts/2019/01/28/pa-attorney-general-josh-shapiro-criminal-investigation-oil-gas-industry-washington-county-environmental-crimes/stories/201901210078
- A request for information "REFERRING TO" (and/or ANY form thereof), "RELATING TO" (and/or ANY form thereof), "CONCERNING" (and/or ANY form thereof), "REGARDING" (and/or ANY form thereof), or "REFLECTING" (and/or ANY form thereof) a given subject matter shall be construed in the broadest sense and shall include information that, directly or indirectly, constitutes, embodies, comprises, reflects, represents, supports, contradicts, identifies, records, notes, mentions, states, refers to, refutes, reports upon, responds to, describes, discusses, studies, analyzes, evaluates, contains information concerning, or is in ANY way pertinent or relevant to that subject matter. *As indicated, the term necessarily includes information that is in opposition to as well as in support of YOUR position(s) and claim(s) in this action.*

## REQUESTED DOCUMENTS

1. Any and all DOCUMENTS REFLECTING, CONCERNING, OR REGARDING COMMUNICATIONS with any PLAINTIFF, their agent, attorney, or representative, including SMITH BUTZ and/or GOLDBERG, KAMIN & GARVIN, REGARDING the HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, *Kiskadden v. Department of Environmental Protection*, Environmental Hearing Board Docket No. 2011-149-R, Commonwealth Court Docket No. 1167 CD 2015 and/or *Voyles v. Pennsylvania Department of Environmental Protection*, Commonwealth Court Docket No. 253 M.D. 2011, from January 1, 2012 to the present.

2. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 2 of the Post-Gazette's Petition including the statement that "The Post-Gazette learned that a civil complaint had been filed in the above-captioned case through various media coverage, including a January 28, 2019 article titled 'State conducting criminal investigation of shale gas production.'"

3. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 3 of the Post-Gazette's Petition, including the statement that "on June 15, 2018, a Motion and Order were 'filed under seal' by the Honorable Katherine B. Emery ("Judge Emery"). Again, on September 11, 2018, a Motion and Order were 'filed under seal' by Judge Emery."

4. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 5 of the Post-Gazette's Petition, specifically the statement that "Upon information and belief, the Post-Gazette has learned that a related proceeding is being heard before this Court on February 7, 2019 at 8:45 a.m."

5. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 6 of the Post-Gazette's Petition, including the statement that "the Post-Gazette has only recently been made aware of this matter."

6. Any and all DOCUMENTS RELATING TO the allegations contained in Paragraph 33 of the Post-Gazette's Petition, including the statement that "Range Resources has no governmental interest."

7. Any and all DOCUMENTS referenced in the JANUARY 28 ARTICLE, cited in the Post-Gazette's Petition, ¶ 2, including but not limited to:

   (a) The "August 16, 2018 Letter to attorneys in a civil case" reportedly signed by Deputy Attorney General Courtney Butterfield, and "obtained recently by the Pittsburgh Post-Gazette";

   (b) The September 8, 2018 letter sent from a "resident" to DISTRICT ATTORNEY VITTONE, "asking him to investigate the 'many individuals and companies involved in his situation'";

   (c) The September 13, 2018 letter from DISTRICT ATTORNEY VITTONE to the "resident", reportedly "noting limited jurisdiction" and that DISTRICT ATTORNEY VITTONE was "forwarding a copy of your letter to Acting Chief Deputy Attorney General Rebecca Franz";

8. COMMUNICATIONS between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

9. Any DOCUMENTS RELATING TO the "arrangement" between DISTRICT ATTORNEY VITTONE and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

10. Any COMMUNICATIONS between Washington County residents and the OFFICE OF ATTORNEY GENERAL, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

11. Any DOCUMENTS RELATED TO the May 2017 meeting between the OFFICE OF ATTORNEY GENERAL wherein "17 people from as many as seven counties aired complaints about the shale gas industry," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

12. Any DOCUMENTS RELATED TO the meeting "Late in May 2017" wherein "[Attorney General] Shapiro and AG investigators met in Pittsburgh with representatives from environmental advocacy groups," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

13. Any COMMUNICATIONS between YOU and June Chappel, REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

14. Any COMMUNICATIONS between YOU and any of the "[t]hree others [who] have met with investigators and say they are willing to testify," REGARDING the matters that are the subject of the JANUARY 28 ARTICLE.

15. Any DOCUMENTS RELATED TO or REFLECTING that "the AG's letter was introduced as an exhibit during an August court hearing" in the HANEY-RANGE LITIGATION as reported in the JANUARY 28 ARTICLE.

16. Any DOCUMENTS (the definition of which expressly includes "reporter notes") REGARDING the HANEY-RANGE LITIGATION, the HANEY ALLEGHENY COUNTY LITIGATION, and/or efforts by Stacey Haney, GOLDBERG, KAMIN & GARVIN, and/or SMITH BUTZ to unseal court records and/or publicly or otherwise further disclose the confidential settlement agreement reached in the HANEY-RANGE LITIGATION.

17. Any order, opinion, filing, or transcript RELATING TO any civil, criminal or administrative proceeding that was marked on that proceeding's docket as settled, closed, or final judgment entered at the time in which PG Publishing Company d/b/a The Pittsburgh Post-Gazette sought to intervene from 1950 to the present, excluding the present matter.

# EXHIBIT 6

576 Pa. 151
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant,
v.
Mark BOWDEN and Linn Washington, Jr., Appellees.
Commonwealth of Pennsylvania,
v.
Brian Tyson,
Appeal of Mark Bowden and Linn Washington, Jr.

Argued April 7, 2003.
|
Decided Dec. 19, 2003.

**Synopsis**

**Background:** Reporters who had refused to disclose certain information they had obtained from murder defendant on whom they were reporting were held in contempt of court by the Court of Common Pleas, Philadelphia County, Criminal No. 9710-0014, Civil No. 3192, Dec. Term, 2000, Jane Cutler Greenspan, J., and subsequently sanctioned with fines accumulating at $100 per minute. Reporters appealed. The Superior Court, Nos. 3322 EDA 2000, 3334 EDA 2000, 150 and 294 EDA 2001, 800 A.2d 327, affirmed in part and remanded in part. Reporters sought allowance of appeal, and Commonwealth cross-petitioned.

**Holdings:** The Supreme Court, Nos. 34 and 35 EAP 2002, 36 and 37 EAP 2002, Nigro, J., held that:

[1] Shield Law did not prevent compelled disclosure of defendant's statements to reporters;

[2] qualified reporters' privilege did not protect reporters from compelled disclosure of defendant's statements; and

[3] entering a coercive civil contempt citation requiring reporters to each pay $100 per minute was an abuse of discretion.

Affirmed and remanded.

Lamb, J., filed a concurring opinion.

Cappy, C.J., filed a dissenting opinion in which Castille, J., joined.

West Headnotes (16)

[1] **Privileged Communications and Confidentiality**
Journalists

Shield Law did not afford a complete defense to reporters' compelled disclosure of statements obtained from murder defendant on whom they were reporting about his individual actions on the night of the shooting or his relationship with local drug dealers, which statements were subject to trial court's order; defendant did not provide any information to reporters on a confidential basis, and there was no indication or allegation that defendant's statements to reporters revealed identities of any secondary confidential sources. 42 Pa.C.S.A. § 5942.

3 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Journalists

Documents may be considered "sources" for Shield Law purposes, but only where production of such documents, even if redacted, could breach the confidentiality of the identity of a human source and thereby threaten the free flow of information from confidential informants to the media. 42 Pa.C.S.A. § 5942.

3 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Journalists

Commonwealth made an effort to obtain from other sources information sought from reporters about statements obtained from murder defendant on whom they

were reporting about his individual actions on the night of the shooting or his relationship with local drug dealers, as was required to overcome qualified reporters' privilege; reporters were only feasible sources of statements, as defendant was not an acceptable source for information, not only because it was his own credibility that was at issue, but also because his statements, as they appeared in reporters' notes, were by their very nature unique.

2 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**

Journalists

Commonwealth demonstrated that the only access to information sought was through the reporters and their sources, as was required to overcome qualified reporters' privilege; reporters were only feasible sources of defendant's statements about his individual actions on the night of the shooting or his relationship with local drug dealers.

1 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

Journalists

Commonwealth demonstrated that statements reporters obtained from murder defendant on whom they were reporting about his individual actions on the night of the shooting or his relationship with local drug dealers were "crucial" to its case, as was required to overcome qualified reporters' privilege; case turned on what jury believed defendant's mental state was at the moment he fired his weapon, and all of his statements about the shooting, whether published or unpublished, would directly reflect this mental state, as they would manifest his version of how and why the events on the night of the shooting took place.

1 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**

Journalists

The requirement for overcoming the qualified reporters' privilege that the information sought must be "crucial" is a requirement of its relevance and importance.

1 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

Journalists

Commonwealth's failure to put murder defendant's published statements to significant use at trial did not undermine the need for defendant's statements to reporters, for purposes of determining whether statements were "crucial" to case, as was required to overcome qualified reporters' privilege; relevance and importance of statements did not hinge on the use to which they were ultimately put by the Commonwealth in murder prosecution.

Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**

Privileges not favored

Evidentiary privileges are disfavored because they are in derogation of the search for truth.

Cases that cite this headnote

[9] **Contempt**

Amount of fine

Entering a coercive civil contempt citation requiring reporters to each pay $100 per minute until either they complied with court's order to disclose certain statements made to them by murder defendant or Commonwealth rested its case on rebuttal was an abuse of discretion, where sanction order reflected a failure to apply standards for coercive civil contempt, including failure to make any finding with respect to probable effectiveness

of suggested sanction in bringing about result desired or to consider amount of reporters' financial resources and consequent seriousness of burden to them.

1 Cases that cite this headnote

[10] **Contempt**
Nature and grounds of power

Courts possess an inherent power to enforce their orders by way of the power of contempt.

6 Cases that cite this headnote

[11] **Contempt**
Criminal contempt

**Contempt**
Civil contempt

Generally, contempt can be criminal or civil in nature, and depends on whether the core purpose of the sanction imposed is to vindicate the authority of the court, in which case the contempt is criminal, or whether the contempt is to aid the beneficiary of the order being defied, in which case it is civil.

2 Cases that cite this headnote

[12] **Contempt**
Civil contempt

Civil contempt orders usually occur as one of two sub-species: compensatory or coercive.

Cases that cite this headnote

[13] **Contempt**
Civil contempt

Compensatory civil contempt involves compensation that is paid to the party whom the contempt has harmed, while a coercive civil contempt citation is intended to coerce the disobedient party into compliance with the court's order through incarceration and/or monetary punishment.

Cases that cite this headnote

[14] **Contempt**
Nature and grounds in general

Before a trial court may enter a coercive civil contempt order, the Supreme Court requires consideration of the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

2 Cases that cite this headnote

[15] **Contempt**
Amount of fine

To enter a coercive civil contempt order, a court must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources, and the consequent seriousness of the burden to that particular defendant.

Cases that cite this headnote

[16] **Contempt**
Review

Appellate courts may, under certain circumstances, find that a trial court's monetary contempt sanction is inappropriate; in reviewing a claim that such a contempt sanction is improper, however, the appellate court must affirm the trial court's order unless that court has committed an abuse of discretion.

5 Cases that cite this headnote

**Attorneys and Law Firms**

****742** ***155** Hugh J. Burns, Ronald Eisenberg, Karen A. Brancheau, Philadelphia, for Com.

Benjamin Charles Dunlap, Jr., Craig J. Staudenmaier, Harrisburg, amicus curiae, for Pennsylvania Association of Broadcasters.

  

Teri L. Henning, amicus curiae, for Pennsylvania Newspaper Association.

Robert C. Clothier, Robert C. Heim, Amy B. Ginensky, for Mark Bowden.

Simone White, Ronald A. White, Philadelphia, for Linn Washington, Jr.

Before CAPPY, C.J., and CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and LAMB, JJ.

***OPINION OF THE COURT***

Justice NIGRO.

This appeal concerns the scope of the Pennsylvania Shield Law, 42 Pa.C.S. § 5942, the reach of the qualified reporters' privilege to refuse to disclose sources and materials, and the propriety of a contempt sanction imposed on two reporters for refusing to provide prosecutors with statements made by a criminal defendant while being interviewed prior to his trial.

I

During a protracted feud with local drug dealers in his North Philadelphia neighborhood, Brian Tyson shot and killed ***156** one dealer, a twenty-three year-old named Damon Millner. Tyson readily admitted to the slaying, but at some point claimed that he had acted in self-defense. Later, before his trial for killing Millner, Tyson ****743** contacted *Philadelphia Inquirer* staff writer Mark Bowden and spoke with him on several occasions, providing Bowden with details of the shooting and of his clash with the dealers. Based on this information, Bowden authored a series of three articles for the *Inquirer* in which he explained the Commonwealth's likely theory of vigilantism and Tyson's claim of self-defense. *See generally* Mark Bowden, *Hero or Vigilante? A Man's Fight for His Neighborhood,* PHILA. INQUIRER,, June 21, 1998, at A01; Mark Bowden, *A Frustrating Search for Help,* PHILA. INQUIRER,, June 22, 1998, at A01; Mark Bowden, *A War of Nerves Erupts in Gunfire,* PHILA. INQUIRER,, June 23, 1998, at A01. After reading these articles, *Philadelphia Tribune* investigative journalist Linn Washington, Jr. also spoke with Tyson on numerous occasions and collected information about his case. Ultimately, Washington authored several editorial pieces for the *Tribune* discussing Tyson, *see generally* Linn Washington, Jr., *City Man Trapped in 'Twilight Zone' After Shooting,* PHILA. TRIB.,, July 28, 1998, at 2A; Linn Washington, Jr., *Mystery of Shotgun Magnifies a Murder Case,* PHILA. TRIB.,, Sept. 15, 1998, at 2A; Linn Washington, Jr., *If DA Calls on Thugs, Who Can Get Justice?,* PHILA. TRIB.,,, Aug. 3, 1999, at 2A; Linn Washington, Jr., *Thomas Jones is Not Only Victim of Police Abuses,* PHILA. TRIB.,, July 25, 2000, at 7A; Linn Washington, Jr., *One Black Family that Badly Needs Saving,* PHILA. TRIB.,, Oct. 10, 2000, at 7A, and also authored an article about the Tyson case on a freelance basis for the *Philadelphia Weekly, see* Linn Washington, Jr., *Vigilante or Victim?,* PHILA. WEEKLY,, Sept. 8, 1999, at 9.

Commonwealth prosecutors apparently found that certain portions of these newspaper pieces were inconsistent with statements Tyson had made to authorities. As a result, on October 24, 2000, the Commonwealth directed subpoenas to both Bowden and Washington, instructing them to appear on November 30, 2000, the day before Tyson's trial was scheduled ***157** to begin, and produce to the Commonwealth "all handwritten or otherwise memorialized notes of interviews or phone conversations with Brian Tyson and or [sic] Maya Scarpitti." [1] R.R. 14a, 15a. Bowden and Washington moved to quash the subpoenas on November 29, 2000, arguing that their unpublished notes were protected from disclosure by the Pennsylvania Shield Law and a qualified privilege arising out of the First Amendment to the United States Constitution.

The trial court heard oral argument on the reporters' motions on December 1, 2000, and then began jury selection for Tyson's trial. As jury selection was proceeding, the trial court entered an order on December 4, 2000, granting the reporters' motions in part and denying them in part. Specifically, the court found that the Pennsylvania Shield Law, as interpreted by this Court in *In re Taylor,* 412 Pa. 32, 193 A.2d 181 (1963), did not protect the reporters' notes from production because such protection is afforded only where "the documents sought might reveal confidential sources." *Commonwealth v. Tyson,* No. 14, Oct. Term 1997, slip op. at 1 (Com.Pl.Phila.Dec.4, 2000). The court did recognize, however, that a qualified First Amendment privilege, derived from *Branzburg v. Hayes,* 408 U.S.

665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), provided a limited degree of protection to the confidentiality of the reporters' notes. *Id.* at 1, 3. Nevertheless, the trial court determined ****744** that this qualified privilege did not prevent the compelled disclosure of "verbatim or substantially verbatim statements of [Tyson] involving the incident itself or such statements of [Tyson] which speak to his relationship to drug dealers in [his] neighborhood."[2] *Id.* at 3. In this regard, the court reasoned:

> Because only the reporter and [Tyson] were privy to the conversations, these statements would not be obtainable from any other source. Indeed, in view of [Tyson's] [F]ifth ***158** [A]mendment privilege, the Commonwealth may not simply interview him, as it might with other witnesses. Certainly the statements are relevant and necessary, possibly in the Commonwealth's case in chief, but also for impeachment or rebuttal if [Tyson] decides to present a defense. For these are the statements of [Tyson] and go directly to his guilt or to impeach his defense that the killing was justified....
> *Id.*

Bowden and Washington immediately moved the trial court for a stay of its order, but the court denied that motion from the bench on December 5, 2000. The court then commenced Tyson's trial, first issuing preliminary instructions to the jury and then allowing attorneys for the Commonwealth and Tyson to present their opening statements. Meanwhile, the reporters were seeking a stay of the trial court's order from the Superior Court, which issued a temporary stay on December 6, 2000 pending the Commonwealth's response to the reporters' motion. The trial court, having received word of the Superior Court's stay order, halted Tyson's trial.[3] The following day, the Superior Court entered an order dissolving the temporary stay effective December 8, 2000. Tyson's trial then resumed, with the trial court proceeding to swear the jury and the Commonwealth presenting several of its witnesses as part of its case-in-chief. At the same time, Bowden and Washington were once again seeking a stay, this time from this Court. We issued a temporary stay order on December 11, 2000, but ultimately denied the reporters' request on December 12, 2000. By that point, the Commonwealth had completed its case-in-chief and Tyson's defense case was in progress.

Following this Court's denial of the reporters' request for a stay, the trial court held a mid-trial hearing on the morning of December 13, 2000, at which time the Commonwealth again requested that Tyson's statements be produced. As Bowden and Washington had exhausted all avenues of relief with ***159** regard to a stay of the trial court's order, the court directed the reporters to comply with its December 4, 2000 order by 12:00 p.m. on the day of the hearing or be held in contempt of court. The court reiterated that Bowden and Washington could comply with the court's edict by producing the subject statements either orally or in writing, and thus could avoid having to provide the Commonwealth with their actual notes.

Bowden and Washington declined to comply with the trial court's order by the stated deadline and thus were held in contempt. ****745** Specifically, the trial court entered what it characterized as a coercive civil contempt citation: an order that "each [reporter] must pay $100 per minute starting 12:00 noon this date until compliance or until the Commonwealth finally rests its case on rebuttal [of Tyson's defense]." *Commonwealth v. Tyson,* No. 14, Oct. Term 1997 (Com.Pl.Phila.Dec.13, 2000). The Commonwealth completed its rebuttal the following day, December 14, 2000, and the jury subsequently found Tyson guilty of third-degree murder. Thereafter, the court advised Bowden and Tyson that 400 minutes of trial were covered by the contempt order, and, accordingly, that each reporter's sanction totaled $40,000.

Bowden and Washington appealed to the Superior Court, which affirmed in part and remanded in part. *Commonwealth v. Tyson,* 800 A.2d 327 (Pa.Super.2002). The court found that the trial court had correctly interpreted the Pennsylvania Shield Law, explaining that our post-*Taylor* decision in *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (1987), had interpreted the Shield Law as protecting only the confidentiality of a source's identity. *Tyson,* 800 A.2d at 333. As Tyson had discussed only his own actions with Bowden and Washington, the court reasoned that there was no danger that disclosure of [Tyson's] unpublished statements would reveal any confidential informants. *Id.* Thus, the court concluded that the Shield Law did not protect Tyson's statements to the reporters from compelled disclosure. *Id.* at 333-34.

With respect to the reporters' qualified privilege claim, the court concluded that the Commonwealth had satisfied

its *160 burden of proving (1) that it had exhausted attempts to obtain the information from other sources, (2) that the information sought was "material[,] relevant[,] and necessary," and (3) that the information sought was "crucial" to its case. *See id.* at 331-32 (citing *Davis v. Glanton,* 705 A.2d 879, 885 (Pa.Super.1997)). Specifically, the court reasoned that the Commonwealth could not obtain Tyson's statements from any source other than the reporters because only Tyson and the reporters were present at each interview, because the Commonwealth could not directly compel Tyson to produce the statements, and because Tyson would either not reveal the statements or not reveal them in an accurate manner on cross-examination. *Id.* at 332. In addition, the court found that the Commonwealth had demonstrated that Tyson's statements were relevant because Tyson had claimed self-defense, making his statements about the shooting "directly relevant and crucial to countering his self-defense theory and impeaching his credibility." *Id.* The court similarly concluded that Tyson's statements were crucial to the Commonwealth's case and its effort to counter Tyson's defense because such statements would help the Commonwealth prove that [Tyson] shot the victim deliberately to help rid his neighborhood of drugs and gangs, rather than in self-defense. *Id.* at 332-33.

In spite of its agreement with the trial court's Shield Law and qualified privilege findings, the Superior Court nevertheless found that the contempt sanction it imposed was "harsh and excessive. *Id.* at 335. The Superior Court acknowledged that a trial court has discretion to impose sanctions to vindicate its orders and authority, yet the court determined that the trial court's steep sanction was unprecedented and shocking, especially given that the sanction had accumulated during less than seven hours of trial. *Id.* Accordingly, the Superior Court remanded the matter to the trial court for a determination of a more appropriate sanction. *Id.*

**746 Judge Stevens dissented from the majority's analysis and conclusions pertaining to the Shield Law and qualified privilege. *See generally id.* at 335-36 (Stevens, J., dissenting). Specifically, he found that *Taylor,* not *Hatchard,* should have *161 been applied to the Shield Law analysis of this case, as *Taylor* and the instant case involved criminal proceedings, whereas *Hatchard* was a defamation case. *Id.* at 336. Judge Stevens contended that the Superior Court was therefore bound to follow this Court's construction of the Shield Law in *Taylor,* arguing that it required absolute protection of the content of the reporters' notes. *Id.* With respect to the reporters' qualified privilege claim, Judge Stevens reasoned that the Commonwealth had failed to demonstrate that Tyson's statements were crucial to its case and thus had not met its burden. *Id.* at 335-36.

Bowden and Washington sought allowance of appeal, challenging the propriety of the Superior Court's Shield Law and qualified privilege findings. The Commonwealth cross-petitioned, contending that the Superior Court should not have vacated the trial court's contempt sanction. We granted the parties' petitions, *Commonwealth v. Bowden,* 572 Pa. 695, 813 A.2d 835 (2002); *Commonwealth v. Tyson,* 572 Pa. 704, 813 A.2d 841 (2002), and now affirm.

## II

### A

[1] Bowden and Washington first contest the construction applied to the Pennsylvania Shield Law by the courts below. The Shield Law provides:

**§ 5942. Confidential communications to news reporters**

> **(a) General Rule.**-No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

*162 42 Pa.C.S. § 5942(a) (boldface in original).[4] Bowden and Washington contend that this statute, enacted by the General Assembly to protect reporters from the threat of subpoena, provides an absolute privilege that shelters reporters from compelled disclosure of their unpublished materials. In support of this contention, they rely on this Court's decision in *In re Taylor,* 412 Pa. 32, 193 A.2d 181 (1963), asserting that it interprets the Shield Law as protecting reporters' unpublished information from disclosure regardless of the confidentiality of any human sources. The reporters

also aver that the *Taylor* decision has been incorporated into the Shield Law itself, as the General Assembly twice re-enacted the Shield Law following *Taylor*. *See infra* note 5. Furthermore, Bowden and Washington acknowledge this Court's decision in *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (1987), but maintain that it only applies in cases where application of the *Taylor* archetype would thwart a claim of defamation. Thus, applying *Taylor*, the reporters contend that the absolute privilege provided by the Shield Law protected their unpublished materials from disclosure. We disagree.

**747 In *Taylor*, a grand jury was convened to investigate allegations of corruption involving various branches of the Philadelphia city government. 193 A.2d at 182. Thereafter, the *Philadelphia Evening Bulletin* published an article in which it reported that the Philadelphia District Attorney's office had interrogated former city official John J. Fitzpatrick, who was under investigation by the grand jury. *Id.* Among other things, the *Bulletin* article stated that the District Attorney's office had asked Fitzpatrick certain questions regarding prior statements he had made in interviews with *Bulletin* reporters. *Id.* This statement in the article prompted the service of a grand jury subpoena on the *Bulletin* 's Robert L. Taylor and Earl Selby for production of all documents that pertained to the *Bulletin* 's interviews with Fitzpatrick. *Id.* Taylor and Selby appeared before the grand jury, but refused to answer *163 certain questions, citing the Shield Law.[5] *Id.* at 182-83. Based on this refusal, Taylor and Selby were brought before the trial court, which held them in contempt after they again refused to answer questions that the court had deemed permissible. *Id.* at 183. In doing so, the trial court reasoned that the Shield Law protects reporters from compelled disclosure of personal identities, not documents or other inanimate objects. *Id.* Thus, the court concluded that Taylor and Selby were not required to produce documents that could lead to the identification of any confidential sources. *Id.* Nevertheless, it did find that Taylor and Selby were obligated to testify about, and produce documents relating to, statements Fitzpatrick had made to *Bulletin* reporters, explaining that the *Bulletin* had waived the Shield Law privilege by stating in the article that the District Attorney's office had questioned Fitzpatrick about his contact with *Bulletin* reporters. *Id.* To protect the identity of any confidential human sources, however, the court directed Taylor and Selby to provide the documents with all names deleted. *Id.* at 186.

On appeal, this Court reversed the trial court order holding Taylor and Selby in contempt. As an initial matter, the Court focused its inquiry on the terms of the Shield Law, which it considered clear. *Id.* at 184. In particular, the Court explained that the term source of information includes documents as well as personal informants, and also reasoned that '[s]ource' means not only the identity of the person, but likewise includes documents, inanimate objects and all sources of information. *Id.* at 184-85 (emphases omitted). Moreover, the Court stated that any doubts in construing the Shield Law had to be construed in favor of the *Bulletin* due to the *164 interests underlying the Shield Law-specifically, the need to shelter members of the media from subpoenas in order to preserve their role as the principal watch-dogs and protectors of honest, as well as good, Government. *Id.* at 185. Similarly, the Court found that the General Assembly, in enacting the Shield Law, had placed greater emphasis on the public interest in an unfettered press than on disclosure of alleged crimes through subpoenas directed to the media. *Id.* at 185-86. Importantly for instant purposes, this Court also explained **748 that the Shield Law must be interpreted to apply to documents because:

> If the [Shield Law] applies only to persons and does not include documents, then logically [Taylor and Selby] would have to disclose and produce all documents in their possession. However, [the trial court] in an attempt to fairly (although erroneously) limit the source of information to persons as distinguished from documents, ruled that [Taylor and Selby] were required to produce only the documents ... allegedly evidencing what Fitzpatrick had told reporters with all names deleted. *No one could know with certainty whether the documents as deleted by the newsman would still reveal sources of information which the [Shield Law] intended to protect.* [The trial court] based [its] ruling principally if not solely on [its] conclusion that the

> *Bulletin* had waived the privilege created by the [Shield Law] by publishing in its aforesaid article [the statement that certain questioning by the District Attorney's Office implicated statements Fitzpatrick had made to *Bulletin* reporters]. This obviously gave Fitzpatrick as the leading source, *but the identity of many other persons may have been revealed in the questions and/or the answers.*

*Id.* at 186 (emphases omitted and added; footnote omitted). Finally, the Court concluded that the trial court had incorrectly applied the waiver doctrine, because the doctrine only applies to statements actually published by the relevant media outlet. *Id.* at 186.

While Bowden and Washington rely heavily on *Taylor* in support of their assertion that the Shield Law protects Tyson's ***165** statements from disclosure, the facts of *Taylor* are readily distinguishable from the instant case and, as a result, *Taylor* 's holding does not control here. As indicated above, *Taylor* involved a grand jury convened to probe allegations of widespread governmental corruption. *Id.* at 182. Allegations of conspiracy, solicitation, bribery, and other crimes reached both the legislative and executive branches of the Philadelphia city government, including the Zoning Board of Adjustment and the Department of Licenses and Inspections, and such allegations also extended to members of the City Committee of the Democratic Party. *Id.* Under such circumstances, Fitzpatrick likely identified numerous secondary sources for his knowledge regarding this widespread corruption, and all documents relating to Fitzpatrick's contacts with the *Bulletin,* even if every name had been redacted, had the potential to reveal sources of information which the [Shield Law] intended to protect. *Id.* at 186. As the *Taylor* court explained, the identity of many other persons may have been revealed, by insinuation, via the questions posed by Fitzpatrick's interrogator and the answers he rendered.[6] *Id.* Thus, ****749** given the special ***166** set of facts upon which *Taylor* turned, we read that case as standing only for the proposition that documents are to be considered sources where their production, even with all names redacted, could breach the confidentiality of a human source.[7] *Id.; see also In re "B"*, 482 Pa. 471, 394 A.2d 419, 429 (1978) (Roberts, J., concurring) ("We held in [*Taylor* ] that where a newsman's source is protected under the statute, so, too, are all *documents and records which would tend to disclose that source.* (emphasis added)); *cf. Hepps v. Phila. Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374, 386-87 (1984) (citing *Taylor* for the proposition that the Shield Law permits documentary sources to be withheld because "the identity of all persons named *or implicated* in these sources is also included within the protection of the [Shield Law]" (emphasis added)), *rev'd on other grounds,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

Significantly, in the instant case, there is no risk that the statements at issue will reveal the identities of any confidential human sources. This is so because, in marked contrast to *Taylor,* this case involves discussions between just three individuals: Bowden, Washington, and Tyson. Moreover, only Tyson's statements about his individual actions on the night of the shooting and his relationship with local drug dealers are subject to the trial court's order. Put simply, Tyson made the ***167** subject statements to Bowden and Washington, his identity is not confidential, and there is no indication or allegation in this case that the identities of other individuals from whom Tyson may have obtained information will be revealed if Tyson's statements are disclosed. Therefore, unlike *Taylor,* there is no indication here that the identity of ... other persons may [be] revealed through exposure of Tyson's statements.[8] *Taylor,* 193 A.2d at 186; *see Tyson,* 800 A.2d at 333 ("[Tyson] only spoke to the reporters about his own actions, and therefore, there is also no danger ****750** that disclosure of his unpublished statements would reveal any confidential informants.). Accordingly, based on an appropriate reading of *Taylor,* we conclude that the Shield Law does not afford a complete defense to disclosure of Tyson's statements.

In addition to *Taylor* 's patent dissimilarity to the instant case, any broader interpretation of the Shield Law that could be gleaned from that case has been rejected by subsequent decisions of this Court.[9] *Cf. Davis v. Glanton,* 705 A.2d 879, 884 (Pa.Super.1997) (explaining that newspaper's argument might be persuasive if *In re Taylor* were the final statement of our supreme court on the interpretation and application of the Shield Law.). In our 1987 decision in *Hatchard,* for example, we were confronted with the question of whether the use of the term 'source' in the context

of the [Shield Law] reflects a legislative intention to protect *all* documentary information from discovery by a plaintiff in a defamation ***168** action, regardless of whether the documentary information could reveal a confidential media-informant. 532 A.2d at 348 (emphasis in original). In reaching the conclusion that the Shield Law did not reflect such an intention, we reasoned that the *Taylor* decision, when applied in conjunction with recent developments in constitutional law relating to defamation, would effectively and improperly preclude a plaintiff's defamation action against a media defendant. *Id.* at 348-49, 350-51. Moreover, we relied on the purpose of the Shield Law to determine its scope:

> The obvious purpose of the Shield Law is to maintain a free flow of information to members of the news media. We fail to see how this purpose is promoted by protecting from discovery documentary information that was in the possession of the publisher of the defamatory statement where disclosure of this information would not reveal the identity of a confidential media-informant. While there may be some who would only share information with the media if the media enjoyed an absolute shield from any discovery in civil proceedings, providing an absolute shield could hardly be said to be necessary to effectuate the purpose of the Shield Law in light of the information that flows freely in states that have enacted more carefully-tailored shield laws and the considerable burden of proof imposed on a defamation plaintiff by the requirements of the First Amendment. We see no apparent reason why the objective of promoting the free flow of information to the media would be defeated so long as any documentary information that could lead to the discovery of the identity of a confidential informant is shielded from disclosure.

*Id.* at 350 (citation omitted). We then took this logic one step further, stating that to the extent that language in *In re Taylor* may be read as interpreting the Shield Law to protect from discovery, in defamation actions, documentary material that could not reasonably lead to the discovery of the identity of a confidential media-informant, that decision interpreted the ****751** Shield Law much too broadly. *Id.* at 351. Accordingly, we concluded that unpublished documentary information gathered ***169** by a television station is discoverable by a plaintiff in a libel action to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information. *Id.; see also Davis,* 705 A.2d at 882, 885 (interpreting *Hatchard* as permitting disclosure of all material pertaining to conversations with disclosed sources as long as the material cannot reasonably lead to the discovery of the identity of another, undisclosed source, or can be redacted to prevent such revelation); *Pa. Bar Ass'n v. Commonwealth,* 147 Pa.Cmwlth. 351, 607 A.2d 850, 855 n. 6 (1992) (noting that *Hatchard* court held that Shield Law could not be interpreted to shield information that could not possibly lead to discovery of the identity of the confidential source).

The following year, in *Sprague v. Walter,* 518 Pa. 425, 543 A.2d 1078 (1988), we confronted the question of whether, in the context of a defamation case, invocation of the Shield Law carried with it a concomitant inference of the reliability of the information provided by the confidential source. In answering that question in the negative, we pointed out that [t]he language of our Shield Law reflects [its] purpose by protecting the media against the forced disclosure of the identity of its sources. *Id.* at 1083. Importantly, we also discussed the relationship between *Taylor* and *Hatchard:*

> In attempting to justify its adoption of an expansive reading of our Shield Law provision, the Superior Court relied heavily upon the language appearing in our decision in *In re Taylor* .... However, we subsequently ... modified the expansive interpretation of the Shield Law as set forth in *Taylor. Hatchard v. Westinghouse Broadcasting Co.,* 516 Pa. 184, 532 A.2d 346 (1987). We adhere to that modified view today in holding that the privilege provided under the Shield Law was not intended to allow a media defendant to use any of its sources and information as proof of verification or evidence of responsibility when it opts to rely upon the privilege.

*Id.* (emphasis omitted). We therefore held that no inference regarding the reliability or accuracy of

information provided *170 by an unidentified source could be drawn from invocation of the Shield Law. *Id.* at 1086.

Although we are cognizant that *Hatchard* and *Sprague* were defamation cases, and *Hatchard* 's modification of *Taylor,* as acknowledged in *Sprague,* was undoubtedly provoked by the constitutional conflict identified in that case, we nevertheless see no principled reason why the interpretation of the Shield Law espoused in those cases should not apply in other settings such as this one. To begin with, the statute itself does not indicate that its terms should be interpreted differently in various settings. *Cf. Mishoe v. Erie Ins. Co.,* 573 Pa. 267, 824 A.2d 1153, 1159 n. 8 (2003) (rejecting contention that statutory language should be read as having differing meanings where no indication that legislature intended to use language "as some sort of verbal chameleon"). Indeed, courts in this Commonwealth have already applied *Hatchard* and *Sprague* outside of the defamation setting, and thus have recognized that the Shield Law's text should be read with a single, fixed meaning. *See, e.g., Commonwealth v. Linderman,* 17 Pa. D. & C. 4th 102, 106-07 (Com. Pl. Chester 1992) (criminal case where Commonwealth attempted to subpoena crime scene photos taken by newspaper photographer; court applies *Hatchard* and *Sprague* instead of *Taylor* in rejecting newspaper's claim that photos were "sources"); **752 *Shetler v. Zeger,* 4 Pa. D. & C. 4th 564, 570-73 (Com. Pl. Franklin 1989) (personal injury case where plaintiff attempted to subpoena vehicular accident scene photos taken by newspaper photographer; court finds that "[a]lthough *Hatchard* was decided in the context of a libel action, this court believes its reasoning has equal application to the case at bar"; court consequently denies newspaper's petition for a protective order). Moreover, *Hatchard* 's construction of the Shield Law to protect the free flow of information to the media, while preserving access to certain media materials, applies with equal force outside of the defamation setting. *See Hatchard,* 532 A.2d at 350 (We see no apparent reason why the objective of promoting the free flow of information to the media would be defeated so long as any documentary information that could lead to the *171 discovery of the identity of a confidential informant is shielded from disclosure.). Accordingly, we find that the *Hatchard* interpretation of the Shield Law, consistent with our reading of *Taylor,* applies to this case, and, as a result, we conclude that the Shield Law does not protect Tyson's statements to Bowden and Washington from compelled disclosure.

[2] In conclusion, we construe *Taylor,* as interpreted by *Hatchard* and *Sprague,* as standing for the proposition that documents may be considered sources for Shield Law purposes, but only where production of such documents, even if redacted, could breach the confidentiality of the identity of a human source and thereby threaten the free flow of information from confidential informants to the media. *See Davis,* 705 A.2d at 882, 885. In the instant case, as stated above, it was Tyson who spoke to Bowden and Washington, and he did not provide any information to them on a confidential basis, but rather knew that his statements could be disclosed in their articles. *See Tyson,* 800 A.2d at 333. Moreover, there is no indication or allegation that his statements to the reporters revealed the identities of any secondary confidential sources. Accordingly, disclosure here would not inhibit the free flow of information to the media through the revelation of any confidential human sources, and, therefore, the Shield Law does not prevent the compelled disclosure of Tyson's statements.

**B**

The other contention raised by Bowden and Washington is that the lower courts misapplied the qualified reporters' privilege rooted in the United States Supreme Court decision in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Although the ultimate holding of *Branzburg* was that requiring reporters to appear and testify before state or federal grand juries does not violate the First Amendment freedoms of speech and press, *id.* at 667, 92 S.Ct. 2646, the United States Court of Appeals for the Third Circuit has indicated that a majority of the Supreme Court justices who participated in the five-to-four *Branzburg* decision actually *172 supported some quantum of privilege for reporters. As such, the Third Circuit has concluded that reporters have a qualified right to refuse to disclose their sources and materials. *See Riley v. City of Chester,* 612 F.2d 708 (3d Cir.1979) (privilege recognized and applied in civil case where plaintiff sought identity of confidential source from news reporter); *United States v. Cuthbertson,* 630 F.2d 139 (3d Cir.1980) (*"Cuthbertson I "*) (extending privilege recognized in *Riley* to criminal case and to documents where defendants sought notes of interviews with non-

confidential sources); *United States v. Criden,* 633 F.2d 346 (3d Cir.1980) (applying *Riley* and *Cuthbertson I* in criminal case where defendant sought verification from reporter of conversation with witness who had previously ****753** testified that the conversation occurred);[10] *see also Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden),* 151 F.3d 125, 128 (3d Cir.1998) ("[W]e have recognized that when a ***173** journalist, in the course of gathering the news, acquires facts that become a target of discovery, a qualified privilege against compelled disclosure appertains."); *Coughlin v. Westinghouse Broad. & Cable, Inc.,* 780 F.2d 340, 350 (3d Cir.1985) (Becker, J., concurring) ("In the wake of *Branzburg,* courts faced with assertions of reporters' privileges have proceeded on a case-by-case basis, balancing the reporters' rights against the interests of those seeking information." (footnote omitted)). Bowden and Washington contend that the Commonwealth has failed to overcome this qualified privilege because it failed to explore all possible avenues to obtain Tyson's statements, failed to demonstrate that the reporters were the only sources of the information, and did not show that Tyson's statements were necessary and crucial to its case. The reporters also assert that the lower courts' failure to find the reporters' materials to be privileged will have a chilling effect on the ability of journalists to investigate matters involving the criminal justice system. Consequently, the reporters maintain that we must rule in their favor to protect the important public function served by the news media. Once again, we disagree.

In invoking a qualified privilege for reporters in *Riley, Cuthbertson I,* and *Criden,* the Third Circuit relied upon the concurring opinion of Justice Powell in *Branzburg,* where he stated that:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The [b]alance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

*Riley,* 612 F.2d at 716 (quoting *Branzburg,* 408 U.S. at 710, 92 S.Ct. 2646 (Powell, J., concurring)) (emphasis omitted); *see also Criden,* 633 F.2d at 357 (quoting same). ****754** Based in large part on the foregoing language, the Third Circuit determined that a court "must balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the ***174** case at hand." *Riley,* 612 F.2d at 716; *see Cuthbertson I,* 630 F.2d at 148 ("Because the privilege is qualified, there may be countervailing interests that will require it to yield in a particular case .... (citation omitted))"; *see also Criden,* 633 F.2d at 356 (stating that a case-by-case balancing test applies); *Davis v. Glanton,* 705 A.2d 879, 885 (Pa.Super.1997) (same); *McMenamin v. Tartaglione,* 139 Pa.Cmwlth. 269, 590 A.2d 802, 811 (1991) (same), *aff'd per curiam,* 527 Pa. 286, 590 A.2d 753 (1991).

To assist the lower courts in conducting this balancing, the Third Circuit has set forth several factors that the courts should consider. As an initial matter, the circuit court has acknowledged that those asserting the privilege must overcome the well-settled principle that evidentiary privileges are not favored in litigation because they are in derogation of the search for truth. *Criden,* 633 F.2d at 357-58 (citation omitted). With that principle in mind, the court has stated that it is important for courts faced with privilege questions to consider whether a reporter's source is confidential, because the lack of a confidential source is a factor that favors production. *See Cuthbertson I,* 630 F.2d at 147; *see also Criden,* 633 F.2d at 355-56 (discussing at length the value of confidential sources, and stating that the need for such confidentiality is the foundation of the reporters' privilege). As the court explained:

> [T]here is a general expectation in certain sectors of society that information flows more freely from anonymous sources. Experience in the operation of such public service facilities as hotels, restaurants, and common carriers shows that proprietors often solicit from their customers anonymous

> information grading the service received. Law enforcement officials frequently rely on anonymous tips. The rule protecting a journalist's source therefore does not depart significantly from daily experience in informal dissemination of information.

*Criden*, 633 F.2d at 356 (footnote omitted). The Third Circuit has also stated that the privilege assumes greater importance in civil than in criminal cases, as in criminal cases the public ***175** need to vindicate crime, or the defendant's constitutional right to a fair trial, can take precedence over a reporter's need to maintain confidentiality. *See In re Grand Jury Matter, Gronowicz*, 764 F.2d 983, 986 (3d Cir.1985) (*en banc* ) (" [T]he press privilege recognized in the cited cases is a qualified one, which yields, if the circumstances so require, to the compelling governmental interest in investigation of crime."); *Cuthbertson I*, 630 F.2d at 147 (criminal defendant's constitutional rights "are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant's need for the information); *Riley*, 612 F.2d at 716 (case-by-case approach is mandated even more in civil cases than in criminal cases, for in the former the public's interest in casting a protective shroud over the newsmen's sources and information warrants an even greater weight than in the latter." (citation omitted)). In this regard, the court has placed particular emphasis on the production of evidence in criminal trials, and has directed that courts must assure that all relevant and admissible evidence is produced in order to protect the constitutional rights of criminal defendants. *Criden*, 633 F.2d at 358. Finally, the Third Circuit has recognized that the ****755** status of the media member as a party or non-party witness is relevant to the balancing inquiry, explaining that it should be more difficult to compel production from a non-party witness who has no personal interest in the matter. *See Riley*, 612 F.2d at 716 ("This is not a situation where the reporter is alleged to possess evidence relevant to a criminal investigation.... This is simply a situation where a journalist has been called as a witness to a civil suit in which neither she nor her employer has any personal interest.); *see also In re Grand Jury Matter, Gronowicz*, 764 F.2d at 990 & n. 2 (Garth, J., concurring) (status of party claiming reporters' privilege, "as the target of the investigation, distinguishes this case from other cases in which a qualified common-law privilege was accorded third-party witnesses asked to reveal confidential sources.").

With the foregoing considerations as a backdrop, the Third Circuit has set forth a three-part test that a party seeking to ***176** overcome the qualified reporters' privilege must satisfy. First, the party "must demonstrate that [it] has made an effort to obtain the information from other sources." *Criden*, 633 F.2d at 358-59; *see United States v. Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir.1981) ("*Cuthbertson II* ") (same); *Riley*, 612 F.2d at 717 (same). Second, the party "must demonstrate that the only access to the information sought is through the journalist and [his or] her sources." *Criden*, 633 F.2d at 359; *see Riley*, 612 F.2d at 716 (stating that a showing is required as to the lack of alternative sources); *Davis*, 705 A.2d at 885 (same); *McMenamin*, 590 A.2d at 811 (same). Third and finally, the party "must persuade the court that the information sought is crucial to [its] claim." *Criden*, 633 F.2d at 359; *see Cuthbertson II*, 651 F.2d at 196 (same); *see also Riley*, 612 F.2d at 716 ("the materiality, relevance and necessity of the information sought must be shown), 717 (information must be crucial information necessary for the development of the case; material sought must 'provide a source of crucial information going to the heart of the [claim]' (citation omitted; alteration in original)); *Davis*, 705 A.2d at 885 (stating that party must demonstrate that information is crucial" to its case); *McMenamin*, 590 A.2d at 811 (same). The court has emphasized, however, that the principles and policy considerations set forth above must inform the application of the three-part test and, in fact, may warrant relaxation of the test in certain circumstances. *See Criden*, 633 F.2d at 358 ("We need not develop a precise test for the peculiar circumstances presented here, although we will venture the view that the defendants probably should be required to prove less to obtain the reporter's version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself.").

[3] Here, there is no need to relax the test, as the Commonwealth has clearly satisfied the three prongs articulated above. With respect to the first criterion, whether the Commonwealth has made an effort to obtain the information from other sources, we begin by pointing out that the number of potential sources for Tyson's statements is necessarily limited ***177** to

the two reporters and Tyson, as no other individuals were present during the interviews. Moreover, Tyson was not a viable source because the Commonwealth could not have forced him to produce the statements without running afoul of the Fifth Amendment guarantee against compelled self-incrimination. In addition, this conclusion is unchanged by the fact that Tyson waived his constitutional privilege by testifying in his own defense because, assuming that there were inconsistencies between his unpublished statements and the statements he made to **756 authorities, it is patently unreasonable to assume that Tyson, while under the stress of cross-examination, would have been able or willing to recount accurately the statements he made to Bowden and Washington in some instances over two years prior to trial. Instead, there is a real possibility that a criminal defendant in these circumstances might render a self-serving account of his statements in which he would deny all inconsistency, and the Commonwealth, left without the defendant's actual statements to reporters, would lack a concrete means for confronting such testimony. Thus, Tyson is not an acceptable source for the information, not only because it is his own credibility that is at issue, but also because his statements, as they appear in the reporters' notes, are by their very nature unique. As the Third Circuit has explained:

> [T]he only material we are concerned with in this case is the verbatim and substantially verbatim statements held by [the media entity] of witnesses that the government intends to call at trial. By their very nature, these statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time. Even if the defendants attempted to interview all of the government witnesses and the witnesses cooperated with them, the defendants would not obtain the particular statements that may be useful for impeachment purposes at trial.

*Cuthbertson I,* 630 F.2d at 148; *see Cuthbertson II,* 651 F.2d at 196 (same); *In re Grand Jury Empaneled Feb. 5, 1999,* 99 F.Supp.2d 496, 500-01 (D.N.J.2000) (finding audiotaped statements of criminal defendant to be unique); *Doe v. Kohn Nast* *178 *& Graf, P.C.,* 853 F.Supp. 147, 149-50 (E.D.Pa.1994) ("*Doe I* ") (finding videotaped statements of party-opponent in civil case to be unique and thus not available from another source). Therefore, as Tyson is not a viable source for the statements, we must conclude that Bowden and Washington were the only feasible sources of Tyson's statements.[11] *See Criden,* 633 F.2d at 359 (first criterion held satisfied where the reporter was "the most logical source of information about the conversation with [the source] because [the reporter] was the other participant in it."). Consequently, it was unnecessary for the Commonwealth to attempt to seek Tyson's statements elsewhere, as any such effort would have been futile. *See Davis,* 705 A.2d at 885-86 ( [S]ince [the defamation defendant's] comments were made during an interview with a[] [newspaper] reporter at which no one else was present, the reporter's notes, the only memorialization of the conversation, are the only source of such information and it would be futile to seek it elsewhere."). Accordingly, the Commonwealth has satisfied its burden with regard to the first criterion. *Cf. Criden,* 633 F.2d at 359 (holding first criterion satisfied).

[4] Regarding the second criterion, whether the Commonwealth has demonstrated **757 that the only access to the information sought is through the reporters and their sources, the analysis is the same as that relating to the first criterion. *See Criden,* 633 F.2d at 359 (stating that analysis applied to first criteria also applied to second); *In re Grand Jury Empaneled Feb. 5, 1999,* 99 F.Supp.2d at 501 (same). Specifically, as stated above, Bowden and Washington are the only feasible sources of Tyson's statements. Therefore, the Commonwealth has necessarily demonstrated that the only access to Tyson's *179 statements is through the two journalists. *Cf. Criden,* 633 F.2d at 359 (holding second criterion satisfied based on satisfaction of first).

[5] [6] [7] Finally, with respect to the third criterion, whether the Commonwealth has demonstrated that Tyson's statements were "crucial" to its case, we find this requirement satisfied because the statements sought were both "relevant and important" to the Commonwealth's

case.[12] *See* ***180** *Criden,* 633 F.2d at 359. Significant in this regard is the fact that Tyson's defense at trial rested entirely on his claim that he shot Millner in self-defense:

> **[TYSON'S ATTORNEY]:....**
>
> Ladies and gentlemen, I will conclude by saying this: Brian Tyson is not guilty of murder because he acted in self-defense. Brian Tyson is not guilty of manslaughter because he acted in self-defense. Brian Tyson is not guilty of possessing an instrument of crime because there was no crime. He shot somebody. He killed somebody. All shootings that result in death are not murders. All shootings that result in death are not manslaughter. Ask any ****758** police officer. Ask any soldier. Brian Tyson acted in self-defense.

R.R. 457a (Trial Vol. 4, Dec. 14, 2000, at 114-15). The Commonwealth, on the other hand, was seeking to prove that Tyson committed the killing as an act of vigilantism:

> **[COMMONWEALTH'S ATTORNEY]:....**
>
> Counsel said something about if you are in a war. This was not war. He was not licensed to kill. He is a citizen like anybody else and as he told [the police before the shooting], if you don't take care of it, I will. Well, he did not have that right and you, ladies and gentlemen, I would ask to tell him that he did not have that right....
>
> ... If we had people taking the law into their own hands, it would be the Wild, Wild West and not a civilized society.

R.R. 465a (Trial Vol. 4, Dec. 14, 2000, at 144-45). Thus, this case turned on what the jury believed Tyson's mental state was at the moment he fired his weapon. All of Tyson's statements about the shooting, whether published or unpublished, would directly reflect this mental state, as they would manifest his version of how and why the events on the night of the shooting took place. Accordingly, Tyson's statements about the shooting were plainly "relevant and important" to a determination of whether Tyson acted in self-defense. In addition, Tyson's statements regarding his relationship with the local drug dealers are of identical import, as such statements would be of significant value to the jury in evaluating ***181** the veracity of the Commonwealth's contention that Tyson killed Millner in an effort to rid his neighborhood of drugs. Finally, Tyson's statements to Bowden and Washington, to the extent that they conflicted with his prior statements to the police, were also "relevant and important" because the Commonwealth could have used those statements to impeach Tyson's credibility once he took the stand to proclaim that the shooting was in self-defense. *Cf. Cuthbertson II,* 651 F.2d at 196 ("If [the sources'] testimony at trial differs from their [prior] statement to [the media entity], the defendants will have the opportunity to obtain the materials for impeachment purposes."); *Criden,* 633 F.2d at 359 (holding third criterion satisfied where source's "motivation and credibility" at issue); *Davis,* 705 A.2d at 885 (We agree that given the ambiguity of the published statement, information as to the context in which it was made is relevant, material, necessary and crucial to plaintiffs' attempt to prove that [the defendant] defamed them."). Consequently, we conclude that the Commonwealth has demonstrated that Tyson's statements were "crucial" to its claims,[13] ****759** and, therefore, find that the Commonwealth has ***182** satisfied its burden to overcome the qualified privilege as recognized by the Third Circuit. *See Criden,* 633 F.2d at 359 (holding burden to overcome privilege satisfied in criminal case); *In re Grand Jury Empaneled Feb. 5, 1999,* 99 F.Supp.2d at 501 (holding burden to overcome privilege satisfied in criminal case where prosecution sought audiotape from interview between newspaper reporter and subject of grand jury inquiry); *Davis,* 705 A.2d at 885-86 (holding burden to overcome privilege satisfied).

**[8]** Significantly, this conclusion is consistent with the bulk of the considerations identified by the Third Circuit as informing the three-part test.[14] In particular, the interest in confidentiality is simply not implicated in this case, as Tyson made no effort to conceal his identity and freely communicated with Bowden and Washington about the shooting and his relationship with the local drug dealers. *See Criden,* 633 F.2d at 356 n. 6 ("The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged ...." (citation omitted)). As Judge Rambo explained in her concurring opinion in *Criden:*

> The most cogent argument for the recognition of a newsman's privilege is that the free flow of information to the media will be encouraged if one desiring to communicate information, but fearing exposure, can be assured that his identity will never come to light unless he permits it. Whatever legitimacy this rationale may have, it disappears ***183** once the source willingly identifies himself and consents to disclosure of his communication....
>
> *Id.* at 360-61 (Rambo, J., concurring). Put differently, our decision here will not have a "chilling effect" on the flow of information from confidential sources, *see Cuthbertson I,* 630 F.2d at 147, as the revelation of Tyson's statements does not threaten his own confidentiality or that of another, secondary source. Additionally, the interest in disclosure in this case, a criminal matter, exceeds that of a civil matter due to the public need for access to evidence in order to vindicate crime.[15] *See In re Grand Jury Matter, Gronowicz,* 764 F.2d at 986; *Riley,* 612 F.2d at 716. Finally, disclosure is also warranted in this case based on the general principle that evidentiary privileges are disfavored because they are in derogation of the search for truth. *Criden,* 633 F.2d at 357-58 (citation omitted).

****760** In conclusion, the Commonwealth has met the burden imposed by the Third Circuit on those attempting to surmount the qualified reporters' privilege that has been recognized by that court. Accordingly, the privilege does not protect Bowden and Washington from compelled disclosure of Tyson's statements in accordance with the trial court's December 4, 2000 order.

C

**[9]** In its appeal, the Commonwealth maintains that the Superior Court erred in holding the trial court's sanction order to be "harsh and excessive" and remanding for a recalculation of the sanction to be imposed.[16] Specifically, the ***184** Commonwealth contends that the Superior Court should not have substituted its own judgment for that of the trial court because the trial court acted within its discretion in setting the sanction. The Commonwealth asserts that the trial court's sanction was justified due to the reporters' persistent refusal to comply with the trial court's order and in light of the ability of the *Inquirer* and *Tribune* to pay the sanction imposed.[17] Thus, the Commonwealth maintains that we must reverse the order of the Superior Court to the extent that it vacated the trial court order and remanded for a recalculation of the sanction. We disagree, although our reasoning differs from that offered by the Superior Court.

**[10]** **[11]** **[12]** **[13]** **[14]** **[15]** Courts possess an inherent power to enforce their orders by way of the power of contempt. *Brocker v. Brocker,* 429 Pa. 513, 241 A.2d 336, 338 (1968); *see also Mulligan v. Piczon,* 566 Pa. 214, 779 A.2d 1143, 1149 (2001) (Op. in Supp. of Affirmance) ("It is fundamental that courts possess inherent power to enforce compliance, and to punish non-compliance, with their lawful orders."); *Bata v. Cent.-Penn Nat'l Bank,* 433 Pa. 284, 249 A.2d 767, 768 (Pa.1969) (plurality) ("*Bata II* ") ("The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter." (citation omitted)).[18] Generally, contempt can be criminal or civil in nature, and depends on whether the core purpose of the sanction imposed is to vindicate the authority of the court, in which case the contempt is criminal, or whether the contempt is to aid the beneficiary of the order being defied, in which case it is civil. *Commonwealth v. Marcone,* 487 Pa. 572, 410 A.2d 759, 762 (1980); ***185** *In re Martorano,* 464 Pa. 66, 346 A.2d 22, 27-28 (1975). Civil contempt orders, in turn, usually occur as one of two sub-species: compensatory or coercive. *Bata v. Cent.-Penn Nat'l Bank,* 448 Pa. 355, 293 A.2d 343, 354 n. 21 (1972) ("*Bata III* "); *Brocker,* 241 A.2d at 339. Compensatory civil contempt, as its ****761** moniker suggests, involves compensation that is paid to the party whom the contempt has harmed. *Bata III,* 293 A.2d at 352-53 & n. 13; *Brocker,* 241 A.2d at 339. On the other hand, a coercive civil contempt citation, such as the one in the instant case, is intended to coerce the disobedient party into compliance with the court's order through incarceration and/or monetary punishment. *Bata III,* 293 A.2d at 354 n. 21; *Brocker,* 241 A.2d at 339; *Knaus v. Knaus,* 387 Pa. 370, 127 A.2d 669, 673 (1956). Before a trial court may enter a coercive civil contempt order, however, this Court requires consideration of several relevant factors:

> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable

effectiveness of any suggested sanction in bringing about the result desired.

> It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.

*Brocker,* 241 A.2d at 339 (quoting *United States v. United Mine Workers,* 330 U.S. 258, 304, 67 S.Ct. 677, 91 L.Ed. 884 (1947)); *see also Dep't of Envtl. Res. v. Pa. Power Co.,* 461 Pa. 675, 337 A.2d 823, 832 (1975) (plurality) (probable effectiveness of coercive contempt sanction is inherent aspect of trial court's inquiry); *Flannery v. Iberti,* 763 A.2d 927, 929 (Pa.Super.2000) (ability to comply key consideration in determining propriety of civil contempt order); *Schnabel Assocs., Inc. v. Bldg. & Constr. Trades Council,* 338 Pa.Super. 376, 487 A.2d 1327, 1338-39 (1985) (trial court must consider ability of party to pay before entering monetary contempt sanction); *Davis v.* ***186** *SEPTA,* 30 Phila. 246, 255 (Com.Pl.Phila.1995) (court must consider character and magnitude of harm threatened and probable effectiveness of sanction).

**[16]** Based on the foregoing, it is clear that the appellate courts of this Commonwealth may, under certain circumstances, find that a trial court's monetary contempt sanction is inappropriate. *See, e.g., Bata II,* 249 A.2d at 769-70 (indefinite nature of monetary contempt sanction precludes determination of propriety of sanction); *Schnabel Assocs.,* 487 A.2d at 1338-39 (remanding matter for hearing where trial court failed to consider ability of party in contempt to pay civil contempt sanction); *see also Bata II,* 249 A.2d at 770 (Bell, C.J., concurring) (opining that conditional sanction of $250,000 was excessive under circumstances presented, therefore warranting remand for modification). In reviewing a claim that such a contempt sanction is improper, however, the appellate court must affirm the trial court's order unless that court has committed an abuse of discretion. *Bata II,* 249 A.2d at 768 ("Because of the nature of these [contempt] standards, great reliance must be placed upon the discretion of the trial judge."); *see also Commonwealth v. Baker,* 564 Pa. 192, 766 A.2d 328, 331 (2001) (trial court finding of contempt will not be disturbed absent abuse of discretion); *Garr v. Peters,* 773 A.2d 183, 189 (Pa.Super.2001) (same). We have described the meaning of this standard as follows:

> The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, and discretionary power can only exist within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judges. Discretion ****762** must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary action. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

***187** *Commonwealth v. Shaffer,* 551 Pa. 622, 712 A.2d 749, 751 (1998) (plurality) (quoting *Coker v. S.M. Flickinger Co.,* 533 Pa. 441, 625 A.2d 1181, 1184-85 (1993)); *see also United Parcel Serv., Inc. v. Pa. Pub. Util. Comm'n,* 830 A.2d 941, 948 (Pa.2003) (abuse of discretion committed where decision made in unreasoned framework).

In the instant case, as noted above, the trial court decided on a sanction during a mid-trial hearing that it held during a break in the presentation of Tyson's defense. At this hearing, the Commonwealth requested that Bowden and Washington be held in civil contempt and imprisoned until they complied with the trial court's order. The court, however, suggested that a monetary sanction would be more appropriate:

> Let me ask you this: Rather than forcing compliance or attempting to force compliance through incarceration, what would be the problem with a remedy of a

> thousand dollars an hour until compliance? I have not heard of that but I think that would be more helpful to the Court than just about anything.

R.R. 385a (Trial Vol. 1, Dec. 13, 2000, at 93). The Commonwealth and the reporters debated this possibility, with the reporters ultimately arguing for the court to impose a sanction of one dollar per day until compliance. After rejecting this suggestion, the court indicated, apparently not at the behest of either the Commonwealth or the reporters, that a different monetary sanction might be in order:

> ... We are in a position now where it is 12:30. The jury is coming back at 1:30. We will start up at a quarter to 2:00 with cross examination.
>
> By my count, that is seventy-five minutes. I would make it $100.00 a minute until there is compliance, that would be accurate and I suppose for the paper and certainly for the cost of the litigation that has already gone on, that is probably pretty minimal but I would do $100.00 a minute until compliance and I think that is extremely reasonable since it will not last much more than an hour-and-a-half from now, at best, before the Commonwealth is beyond the point.

***188** R.R. 387a (Trial Vol. 1, Dec. 13, 2000, at 102-03). In response, the Commonwealth urged the trial court to consider increasing the sanction and also to reconsider the Commonwealth's request that the reporters be incarcerated. The court responded:

> I don't want to make these reporters into martyrs, that would not be in anyone's interest, quite frankly, and that is the reason why I am not incarcerating them. I don't think they would be harmed particularly actually by being incarcerated and I don't think virtually any amount of money between now and the time that you are so handicapped that would make the difference here. Even if I did $10,000 a minute, they would probably pay that. I would have to do a million dollars a minute before I would be anywhere near what they would be thinking is in the realm of really severe, so it is to a certain extent something that they have to think about and they should think about and despite the fact that they can certainly afford $100.00 a minute, hopefully they are not taking lightly the fact that they are disobeying ****763** this order. I believe they would not be.

R.R. 388a (Trial Vol. 1, Dec. 13, 2000, at 105). After additional debate about the sanction to be imposed, counsel for Washington pointed out to the trial court that the $100 per minute sanction suggested by the court could have a disproportionate financial impact on the *Tribune*. The court replied:

> The point is to go through the standards that are applicable and decide the case in that way and I don't know the monetary situation of either the Inquirer or the Tribune. You may be in the black and they may be in the red. I don't know but it seems to me that even for the Tribune, I suspect, as though you say your situation may be different, I think even for the Tribune, it is somewhat nominal at $100.00 a minute.

R.R. 389a (Trial Vol. 1, Dec. 13, 2000, at 109-10). After counsel for Washington acknowledged its understanding of the trial court's position, the court continued:

> I think you should be real happy with that. I understand it is somewhat nominal but, at this point, I don't think ***189** $10,000 a minute is going to get compliance either, quite frankly, but I do expect you to

> pay this fine, this contempt fine such as it is.

R.R. 389a (Trial Vol. 1, Dec. 13, 2000, at 110). As it appeared by that point that the court had settled on a $100 per minute sanction, Bowden's attorney then inquired as to the length of time that would be covered by the order, as was previously alluded to by the court. The court then decided to extend the time period beyond the one and one-half hours it originally suggested:

> Until we are ready to go to trial, until we are all together, so it will go to that point and, frankly, it should go beyond. I don't know what they may use this information for, so it is really going to go until the Commonwealth's case is closed on rebuttal and that assumes no surrebuttal, so it will go until that point. In honesty, I expect that to be today and relatively soon today but maybe it will go until tomorrow and then the $100.00 will mount up, indeed.

R.R. 389a (Trial Vol. 1, Dec. 13, 2000, at 110-11). Shortly thereafter, the trial court entered a coercive civil contempt citation requiring Bowden and Washington to each pay $100 per minute until either they complied with the court's December 4, 2000 order or the Commonwealth rested its case on rebuttal.

Based on the foregoing, we have little trouble concluding that the trial court committed an abuse of discretion, as the decision-making process underlying the trial court's sanction order reflects a failure to apply the standards articulated above. For example, although the record does perhaps reflect a consideration of the "character and magnitude of the harm threatened by continued contumacy," *Brocker,* 241 A.2d at 339 (citation omitted); *see* R.R. 387a (Trial Vol. 1, Dec. 13, 2000, at 100-01), the trial court did not make any finding with respect to "the probable effectiveness of any suggested sanction in bringing about the result desired." *Brocker,* 241 A.2d at 339 (citation omitted); *see Pa. Power,* 337 A.2d at 832 (probable effectiveness of coercive contempt sanction is inherent aspect of trial court's inquiry). To the contrary, the court's comments ***190** during the hearing reveal a significant degree of skepticism about the effectiveness of its sanction. *See, e.g.,* R.R. 388a (Trial Vol. 1, Dec. 13, 2000, at 105) ("I don't think virtually any amount of money between now and the time [the Commonwealth would need the statements] would make the difference here."); R.R. 389a (Trial Vol. 1, Dec. 13, 2000, at 110) ("[A]t this point, I ****764** don't think $10,000 a minute is going to get compliance either, quite frankly...."). Moreover, the trial court's statements reflect a failure to "consider the amount of [the disobedient party's] financial resources and the consequent seriousness of the burden to that particular [party]." *Brocker,* 241 A.2d at 339 (citation omitted); *see Schnabel Assocs.,* 487 A.2d at 1338-39 (remanding matter for hearing where trial court failed to consider ability of party in contempt to pay civil contempt sanction); *cf. Fenstamaker v. Fenstamaker,* 337 Pa.Super. 410, 487 A.2d 11, 16 (1985) (sanction imposed upon finding of civil contempt was not abuse of discretion in light of contemnor's sizeable assets). Indeed, although the court appeared to speculate that the two newspapers could afford the sanctions the court had decided to impose, it specifically disavowed having any knowledge of the two newspapers' financial condition.[19] *See* R.R. 389a (Trial Vol. 1, Dec. 13, 2000, at 110) ("I don't know the monetary situation of either the Inquirer or the Tribune. You may be in the black and they may be in the red."). Therefore, as the record reflects the trial court's failure to apply the relevant coercive civil contempt standards, the Superior Court correctly vacated its order as an abuse of discretion.[20] *See* ***191** *Shaffer,* 712 A.2d at 751 ("[D]iscretionary power can only exist within the framework of the law.... Discretion is abused ... where the law is not applied ...." (citation omitted)); *see also Gen. Signal Corp. v. Donallco, Inc.,* 787 F.2d 1376, 1380 (9th Cir.1986) (matter remanded because record did not demonstrate trial court's consideration of relevant coercive civil contempt factors).

We are cognizant that the trial court was required to hold its hearing while simultaneously conducting a jury trial, and, as a result, was not in an ideal position to conduct a lengthy analysis of the factors described above. Nevertheless, we adhere to the requirement that these factors must be subjected to at least some examination by a trial court prior to entry of a coercive civil contempt order. *See Brocker,* 241 A.2d at 339. As the trial court

did not conduct an evaluation of these factors, we are unable to conduct a meaningful review of the Superior Court's **765 conclusion that the sanction imposed was excessive. *See PG Publ'g Co. v. Commonwealth ex rel. Dist. Attorney,* 532 Pa. 1, 614 A.2d 1106, 1109 (1992) ("In order for the appellate review of a trial court's discretionary ruling to be meaningful, the appellate court must understand the factual findings upon which a trial court's conclusions of law are based."). In fact, we venture to state that the Superior Court should not have reached this conclusion, as it too was without the benefit of the trial court's discussion of the relevant criteria. Accordingly, we conclude that the matter must be remanded to the trial court for reconsideration of the sanction *192 to be imposed, but express no view regarding the Superior Court's conclusion that the sanction imposed by the trial court was excessive.[21]

III

In sum, the tribunals below correctly concluded that the Shield Law does not protect Tyson's statements from disclosure in accordance with the trial court's December 4, 2000 order and the Commonwealth satisfied its burden to overcome the reporters' qualified privilege as embodied in relevant Third Circuit precedent. We further conclude that the Superior Court was correct in finding that the trial court committed an abuse of discretion with respect to the amount of the sanction it imposed on Bowden and Washington, albeit for different reasons than those presented by the Superior Court. Accordingly, we affirm the Superior Court's disposition of this matter.

The order of the Superior Court is affirmed, and the matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

Justice LAMB files a concurring opinion.

Chief Justice Cappy files a dissenting opinion in which Mr. Justice Castille joins.

Justice LAMB, Concurring.

I join the majority in holding that the Pennsylvania Shield Law, 42 Pa.C.S. § 5942, does not protect Mark Bowden and Linn Washington, Jr. from disclosing Brian Tyson's statements. I write separately, however, to express my disagreement with the majority's conclusion that the facts of *In re Taylor,* 412 Pa. 32, 193 A.2d 181 (1963), are distinguishable from the instant case. As I would expressly overrule *In re Taylor,* I concur.

*193 Chief Justice CAPPY, Dissenting.

In my view, under the Pennsylvania Shield Law, 42 Pa.C.S. § 5942, Mark Bowden ("Bowden") and Linn Washington Jr. ("Washington") cannot be compelled to disclose Brian Tyson's ("Tyson") statements.[1] Accordingly, I respectfully dissent.

I begin with this court's decision in *In re Taylor,* 412 Pa. 32, 193 A.2d 181 (1963). **766 For all intents and purposes, the relevant facts in *Taylor* are on all fours. There, as here, in connection with a criminal proceeding, the trial court ordered two newspapermen to produce documents that contained the unpublished statements that a disclosed source had made to reporters.[2] Raising the Shield Law, the newspapermen refused to comply with the order. The trial court determined that the Shield Law protects only persons, and found the newspapermen guilty of contempt.

On appeal, we reversed. Rejecting the trial court's interpretation of the Shield Law and concluding that the statute protects documents as well as persons, we held that the trial court could not compel the production of reporters notes and recordings, which included a disclosed sources statements. *Id.* at 184, 186.

We reached our decision by determining what the General Assembly intended the Shield Law to protect through its use of the words "the source of any information" in the statute. In this regard, we stated: "[w]e believe the language of the Statute is clear. The common and approved meaning or usage *194 of the words 'source of information' includes documents as well as personal informants. 'Source' means not only the identity of the person, *but likewise includes documents,* inanimate objects *and all source of information. Id.* at 184-85 (citations omitted) (emphasis in original). Significantly, in our interpretation of the meaning of the Shield Laws language, we did not distinguish between confidential and non-confidential sources or place limits on the information the statute protects.

We then stated that the Shield Law must be liberally construed in favor of the news media, and to make clear just how broadly protective the statute is, we took judicial notice of the fact that the tips and leads that the news media rely upon for reporting on matters of great public importance would dry up unless newsmen are able to *fully and completely* protect the sources of their information. *Id.* at 185 (emphasis in original).

We went on to explain why the trial courts direction that the names be redacted from produced materials, *see supra* n. 2, would have failed to serve the trial courts well-intentioned, but mistaken, belief that the Shield Law protects only persons, by pointing out that "[n]o one could know with certainty whether the documents as deleted by the newsman would still reveal sources of information which the [Shield Law] intended to protect. *Id.* at 186.

Further, we resolved that the trial court wrongly determined that the Shield Laws protection had been waived because the newspaper had named its source, stating that a waiver by a newsman applies only to the statements made by an informer which are actually published or publicly disclosed and not to other statements made by the informer to the newspaper. *Id.* (footnote omitted).

Finally, we clarified that the Shield Laws purpose, object and intent would be *realistically* nullified if the courts were to determine what information in documents should be protected and what information should be disclosed. *Id.* (emphasis in original).

***195** This interpretation of the Shield Law drew a pointed dissent from Justice Cohen, who took issue with the determination that the statute covers both information and persons. Justice Cohen believed that the Shield Law covered only the identity of ****767** sources. He asserted that the purpose of the Shield Law "is to encourage the flow of news [from] persons who might otherwise fear the unfavorable publicity or retribution resulting from the revelation of their name as the source of the news story[,] and believed that [t]his purpose is accomplished by permitting the newsman to conceal the name of the informant." *Id.* at 187 (Cohen, J., dissenting). According to Justice Cohen, *it is the name of the informant and and* [sic] *not the information itself which is protected.* Once the name of the informant is revealed, the purpose and protection of the Act is terminated. *Id.* (emphasis in original).

In 1968, five years after *Taylor* was decided, the General Assembly amended the Shield Law to expand the statutes coverage to include reporters employed by the electronic and wire services.[3] Eight years after that, in 1976, the General Assembly reenacted the Shield Law in its entirety.[4] On both of these occasions, the legislature did not make changes to the words source of information in the statute. Thus, under the Statutory Construction Acts instruction, this court should presume that the legislature intends that we place on the Shield Law today the interpretation we gave those words in *Taylor. See* 1 Pa.C.S.1922(4).[5]

***196** Accordingly, I believe that in the present case, the Shield Law protects Bowden and Washington from disclosing Tysons unpublished statements because the statute reflects our decision in *Taylor,* which, as I understand it, holds that the Shield Law protects a known source's information (like his statements) that has not been published.

The majority presently comes to a different result because it "read[s] [*Taylor* ] as standing only for the proposition that documents are to be considered sources where their production, even with all the names redacted, could breach the confidentiality of a human source." (See Majority Opinion, 576 Pa. at 166, 838 A.2d at 749) (footnote omitted).[6] In other words, *Taylor* held that the Shield Law protects only persons, not information.

This is not, however, what this court's majority in *Taylor* held. It is, instead, the position that Justice Cohen took regarding the Shield Law's meaning in his dissenting opinion. *See Taylor* 193 A.2d at 187 (Cohen, J. dissenting). Thus, in the present ****768** case, the majority does not "read" *Taylor,* but rather, overrules and re-writes it.

In doing so, the majority violates two fundamental principles of Pennsylvania jurisprudence. First, the majority disregards the doctrine of stare decisis. As we have stated, the doctrine simply declares that, for the sake of certainty a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same even though the parties may be different. *See Burtts Estate,* 353 Pa. 217, 44 A.2d

670, 677 (1945) (quotation omitted). Second, the majority ignores the prohibition against judicial legislation. In re-writing *Taylor,* the majority has amended the Shield ***197** Law, because *Taylor,* as originally written, is what the General Assembly intends the Shield Law to mean. *See* 1 Pa.C.S.1922(4). [7]

I, therefore, respectfully dissent. And because I believe that the Shield Law does not allow a court to order Bowden and Washington to disclose Tyson's statements, I would reverse the Superior Court's order. [8]

Justice CASTILLE joins this dissenting opinion.

**All Citations**

576 Pa. 151, 838 A.2d 740, 32 Media L. Rep. 1257

Footnotes

1 The Commonwealth eventually abandoned its pursuit of the reporters' notes that pertain to Scarpitti, who is Tyson's wife.

2 It appears that the trial court derived the phrase "verbatim or substantially verbatim statements" from *United States v. Cuthbertson,* 630 F.2d 139, 143 (3d Cir.1980), a case discussing the meaning of *Branzburg. See infra* part II-B.

3 The trial court temporarily stopped Tyson's trial due to the vagueness of the Superior Court's stay order. Ultimately, however, the trial court determined that the Superior Court's stay order did not pertain to the trial itself, but rather applied only to the trial court's directive that Bowden and Washington produce Tyson's statements.

4 Subsection (b) of section 5942, not applicable here, provides that the general rule in subsection (a) does not apply where a radio or television station has failed to maintain some type of recording of the relevant broadcast for at least one year. *See* 42 Pa.C.S. § 5942(b).

5 At that time, an earlier version of the Shield Law was in effect, although it was identical in all material respects to the current version of the Law. *See* Act of June 25, 1937, P.L. 2123, No. 433, 1 (formerly codified at 28 P.S. 330); Act of Dec. 1, 1959, P.L. 1669, 1 (same). Following *Taylor,* the General Assembly reenacted the Shield Law with minor modifications not at issue here. *See* Act of July 31, 1968, P.L. 858, No. 255, 1. Finally, in 1976, the legislature once again reenacted the Shield Law, at that time codifying it as part of the Judicial Code. *See* Act of July 9, 1976, P.L. 586, No. 142, 2 (codified at 42 Pa.C.S. 5942); Act of April 28, 1978, P.L. 202, § 2(a) (repealing former 28 P.S. § 330).

6 It is this vital aspect of *Taylor* that leads us to reject the reporters' contention that it should be read as interpreting the Shield Law as protecting non-confidential sources in addition to confidential sources. Moreover, our reading of *Taylor* is consistent with the statute itself, as it states that no person in a newsgathering enterprise shall be required to *disclose* the source of any information procured or obtained, 42 Pa.C.S. § 5942(a) (emphasis added), which plainly presupposes a confidential source. *See* BLACK'S LAW DICTIONARY 477 (7th ed.1999) (defining "disclosure" in part as "[t]he act or process of making known something that was previously unknown"); *see also* AMERICAN HERITAGE DICTIONARY 375 (1969) (defining "disclose" in part as "[t]o make known; divulge"). We also find it significant that the statute is entitled "***Confidential* communications to news reporters,**" 42 Pa.C.S. § 5942 (emphasis added; boldface in original), which indicates that only *confidential* communications are protected by the Shield Law. *See* 1 Pa.C.S. § 1924 ("The title ... of a statute may be considered in the construction thereof."); Malcolm J. Gross, *Subpoenas and Newsrooms-The Impact of Pennsylvania's New Reporter's Privilege and Newly-Interpreted Shield Law,* 65 PA. B. ASS'N. Q.. 51, 53 n. 26 (1994) ("Neither Pennsylvania's first Shield Law [n]or any revisions contained 'confidential' in their captions. However, when the Legislature [re]codified the Shield Law in 1976, the caption that previously had been carried by Purdon's, specifically, 'Confidential [c]ommunications to [n]ews [r]eporters,' apparently became part of the law."); *see also McMenamin v. Tartaglione,* 139 Pa.Cmwlth. 269, 590 A.2d 802, 811 (1991) (stating that Shield Law "clearly applies to a reporter protecting his 'confidential sources'), *aff'd per curiam,* 527 Pa. 286, 590 A.2d 753 (1991).

7 This admittedly narrow reading of *Taylor* is entirely consistent with the plain text of the Shield Law, and largely deflates certain criticisms that met the decision following its announcement. *See, e.g.,* Recent Case, *Evidence-Privileged Communications-Journalist Need Not Reveal Information Disclosed by Confidential Informant-In the Matter of Taylor (Pa.1963),* 77 HARV. L.REV.. 556, 557 (1964) ("The [*Taylor* ] court's analysis ... blurs the distinction between the meaning of 'source' and of 'information' in the present context.); Case Comment, *Newspapermen Not Required to Divulge Confidential Information to Investigating Grand Jury Even After Informant's Identity Has Been Voluntarily Disclosed in Newspaper Article,* 112 U. PA. L.REV. 438, 441 (1964) (If the legislature intended to include the information itself, it could have used 'information,' as it did in the statute creating the physician-patient privilege, or the words 'confidential communication,' as it did in the attorney-client privilege statute. (footnotes omitted)).

8 Additionally, even if the reporters' notes could be considered "sources" under *Taylor,* we find it significant that the trial court did not require their actual notes to be furnished to the Commonwealth. Rather, as the trial court repeatedly emphasized, it commanded Bowden and Washington to produce Tyson's statements-the content *derived* from the reporters' notes-either orally or in writing.

9 It is for this reason that we are not persuaded by the reporters' reliance on federal decisions interpreting the Shield Law after *Taylor* but before our post-*Taylor* cases. *See, e.g., Coughlin v. Westinghouse Broad. & Cable Inc.,* 780 F.2d 340, 343-44, 347 (3d Cir.1985) (Becker, J., concurring); *Lal v. CBS, Inc.,* 726 F.2d 97, 100-01 (3d Cir.1984); *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264, 277-79 (3d Cir.1980). Similarly, our post-*Taylor* decisions detract significantly from the force of the reporters' argument that the General Assembly has adopted a broad reading of *Taylor* by re-enacting the Shield Law after that decision was rendered.

10 Parenthetically, we note that the Commonwealth urges us to reject these three Third Circuit cases and construe *Branzburg* as not providing Bowden and Washington with any privilege whatsoever. We decline this invitation for several reasons. First, the Commonwealth did not make this argument to the trial court. Indeed, before the trial court, the parties' confined their dispute to the proper interpretation of these Third Circuit cases. Moreover, because we ultimately conclude that the Commonwealth has made a showing sufficient to surmount the qualified privilege as recognized by the Third Circuit, *see infra* pp. 755-59, we need not reach the broader, thornier question of whether the Third Circuit properly interpreted *Branzburg* in recognizing the privilege. *See, e.g., Parsons v. Watson,* 778 F.Supp. 214, 216 (D.Del.1991) ("The variety of interpretations of *Branzburg* is astonishing."). Furthermore, our application of Third Circuit precedent in this matter is consistent with our general practice of deferring to the Third Circuit concerning federal questions. *See, e.g., Commonwealth v. Negri,* 419 Pa. 117, 213 A.2d 670, 672 (1965) (plurality) ("If the Pennsylvania courts refuse to abide by [the Third Circuit's] conclusions, then the individual to whom we deny relief need only to 'walk across the street' to gain a different result.). In fact, courts in the Commonwealth appear to have adhered to this principle by applying, without questioning, the Third Circuit's decisions that recognize the privilege. *See, e.g., Davis v. Glanton,* 705 A.2d 879, 885-87 (Pa.Super.1997); *McMenamin v. Tartaglione,* 139 Pa.Cmwlth. 269, 590 A.2d 802, 811 (1991), *aff'd per curiam,* 527 Pa. 286, 590 A.2d 753 (1991). Therefore, although we recognize the ongoing debate over the meaning of *Branzburg, see, e.g., United States v. Smith,* 135 F.3d 963, 969 (5th Cir.1998) (rejecting holding of *Cuthbertson* ), we nevertheless assume, without deciding, that *Branzburg* affords a qualified privilege to reporters.

11 The reporters' contention that the articles themselves constituted an alternative source misses the mark because the trial court's order pertains to Tyson's published *and* unpublished statements. As the articles did not contain Tyson's unpublished statements, they were not a viable alternative source. *See In re Grand Jury Empaneled Feb. 5, 1999,* 99 F.Supp.2d at 500 (finding published article to be insufficient alternative to original audiotape source because, "[i]n order for the grand jury to properly assess the evidence, it must be able to hear the actual conversation between the reporter and [the subject of the grand jury inquiry], and not just read mere snippets of the interview printed in the article.").

12 Unlike Bowden and Washington, who read the term "crucial" in its most restrictive sense, we read that term in accordance with the meaning that the Third Circuit has ascribed to it. Specifically, in *Criden,* the most recent decision in the *Riley-Cuthbertson I-Criden* trilogy, the court deemed the requirement that the information be "crucial" to be a requirement of its "relevance and importance." *See Criden,* 633 F.2d at 359 (stating that third prong of burden requires showing that information sought is "crucial"; three paragraphs later stating that "[t]he final criterion under *Riley, relevance and importance* to the particular proceeding, follows from the preceding discussion." (emphasis added)); *In re Grand Jury Empaneled Feb. 5, 1999,* 99 F.Supp.2d at 501 ("Relevance and importance to the particular proceeding is the final criterion under *Riley.*"); *cf. Riley,* 612 F.2d at 716 ("In striking the delicate balance between the assertion of the privilege on the one hand and the interest of either criminal or civil litigants seeking the information the materiality, relevance and necessity of the information sought must be shown."). Moreover, our understanding of this third requirement is consistent with that found in Justice Stewart's dissenting opinion in *Branzburg,* which has been widely recognized as the source of the three-pronged inquiry. *See Branzburg,* 408 U.S. at 743, 92 S.Ct. 2646 (Stewart, J., dissenting) ("I would hold that the government must ... demonstrate a compelling and overriding interest in the information"); *see also Matter of Contempt of Wright,* 108 Idaho 418, 700 P.2d 40, 43 (1985) ("Courts finding a qualified privilege generally have applied a balancing test similar to one proposed by Justice Stewart in his *Branzburg* dissent.") In any event, even if we were to read crucial in the restrictive sense advocated by Bowden and Washington, we would find that the showing required by the third criterion must be relaxed in accordance with the guidance of the *Criden* court, given that this case does not require the disclosure of a confidential source and is a criminal case rather than a civil case. *See Criden,* 633 F.2d at 358 (party seeking to overcome privilege "probably should be required to prove less to obtain the reporter's version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself"); *Riley,* 612 F.2d at 716

("This is not a situation where the reporter is alleged to possess evidence relevant to a criminal investigation."); *In re Grand Jury Empaneled Feb. 5, 1999,* 99 F.Supp.2d at 501 ("The seeker of information is required to prove less where, as here, the information sought is nonconfidential and the source self-avowed.).

13 Most of the reporters' contentions with respect to the third criterion are undermined by their underlying reliance on a mistaken interpretation of the term "crucial." *See supra* note 12. Even putting that error aside, however, the reporters' assertion that it was inappropriate for the lower courts to make any assumptions regarding the importance of Tyson's unpublished statements is suspect given that any such determination was thwarted by the reporters' refusal to produce the statements even for *in camera* review. *See* R.R. 24a-25a (Trial Vol. 1, Dec. 1, 2000, at 31-34). If, for example, Tyson had told either Bowden or Washington, "I purposefully shot Millner to rid my neighborhood of drugs," that statement undoubtedly would have been "relevant and important" to the Commonwealth's case. *Cf.* R.R. 25a (Trial Vol. 1, Dec. 1, 2000, at 35) ("**THE COURT:** There is an allegation [Tyson] saw [Millner] with a gun but let's say he told Mr. Bowden ['I saw him with a knife,'] that is pretty crucial information to the Commonwealth."). Indeed, such a stunning admission would have been "crucial" even in the sense that Bowden and Washington employ that term, as it could easily have persuaded the jury to find Tyson guilty of first-degree murder rather than third-degree murder. On the other hand, if Tyson's statements had been completely innocuous and devoid of inconsistency, their "relevance and importance" would obviously have been diminished. Absent disclosure or *in camera* review, there was simply no way to make that determination. *Compare Doe I,* 853 F.Supp. at 149-50 (finding undisclosed statements to be "relevant evidentiary material" that must be submitted for *in camera* review), *with Doe v. Kohn, Nast & Graf, P.C.,* 853 F.Supp. 150, 151-52 (E.D.Pa.1994) ("*Doe II*") (subsequent finding that statements that were submitted for *in camera* review were not "crucial" to claims raised). Additionally, we are also not persuaded by the reporters' repeated insistence that the Commonwealth's failure to put Tyson's published statements to significant use at trial undermines the need for Tyson's statements, as the "relevance and importance" of those statements does not hinge on the use to which they are ultimately put by the Commonwealth.

14 In fact, only the reporters' status as non-party witnesses weighs in favor of non-disclosure.

15 This is wholly consistent with, and a repeated theme of, *Branzburg. See* 408 U.S. at 690-91, 695, 697-98, 92 S.Ct. 2646 (emphasizing public interest in law enforcement).

16 We also note the Commonwealth's contention that the Superior Court should not have addressed the reporters' contention that the trial court's sanction order was excessive because the reporters waived this issue by failing to raise it before the trial court. We disagree, as the record clearly reflects that the reporters urged the trial court to order a smaller contempt sanction than what it ultimately ordered. *See, e.g.,* R.R. 387a (Trial Vol. 1, Dec. 13, 2000, at 100) ("**[BOWDEN'S ATTORNEY]** ... [W]hat I would ask the Court to do is if the Court is going to issue an order of contempt, to impose a minimal sanction, which is what the Court in the Cuthbertson case did, the Third Circuit where they imposed a dollar-a-day fine.").

17 It is essentially uncontested by the parties that the *Inquirer* and *Tribune* will ultimately pay whatever sanctions are imposed on the two reporters.

18 We refer to the noted case as "*Bata II*" due to a prior disposition by this Court in the same matter. *See Bata v. Cent.-Penn Nat'l Bank,* 423 Pa. 373, 224 A.2d 174 (1966) ("*Bata I*").

19 The Commonwealth's reference in its brief to the financial condition of the *Inquirer*'s parent organization does not change the fact that the trial court did not address this consideration in the first instance.

20 We also find noteworthy the apparent degree of caprice that infected the trial court's decision-making process. For example, the court initially, and rather arbitrarily, suggested a $1,000 per hour sanction. *See* R.R. 385a (Trial Vol. 1, Dec. 13, 2000, at 93) ("I have not heard of [a sanction of $1,000 per hour until compliance] but I think that would be more helpful to the Court than just about anything."). Moments later, however, the court changed its mind and decided on a $100 per minute sanction, the equivalent of a $6,000 per hour sanction, or six times the court's originally suggested figure. *See* R.R. 387a (Trial Vol. 1, Dec. 13, 2000, at 102-03). Moreover, the court initially stated that the applicable time period would last for approximately one and one-half hours, thus resulting in a $9,000 sanction. *See* R.R. 387a (Trial Vol. 1, Dec. 13, 2000, at 102-03). However, the court then decided that the time period should be extended until the Commonwealth completed its rebuttal, which in the end entailed six and two-thirds hours of trial time, and consequently resulted in a $40,000 sanction. *See* R.R. 389a (Trial Vol. 1, Dec. 13, 2000, at 110-11). Thus, the trial court essentially increased the sanction from $1,500 ($1,000 per hour over one and one-half hours) to $40,000 ($100 per minute over six and two-thirds hours) without any apparent rationale for doing so. *See Shaffer,* 712 A.2d at 751 ("Discretion must be exercised on the foundation of reason, as opposed to ... caprice or arbitrary action."); *United Parcel Serv.,* 830 A.2d at 948 (abuse of discretion committed where decision made in unreasoned framework).

21 Of course, the trial court may not increase the contempt sanction on remand, as the Commonwealth did not challenge the trial court's initial monetary determination as insufficient via a cross-appeal.

1 The Shield Law provides in relevant part:

> § 5942. Confidential communications to news reporters
>
> (a) General rule.-No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

42 Pa.C.S. § 5942(a).

2 There was a difference in the trial court orders. In *Taylor,* the trial court ordered that the names of persons be deleted from any materials produced. *Taylor,* 193 A.2d at 186. In this case, the trial court did not order a similar redaction.

3 *See and compare* 28 Pa.C.S. § 330, Act of June 25, 1937, P.L. 2123, No.433, § 1, as amended Dec. 1, 1959, P.L. 1669, § 1 with *id.,* as amended July 31, 1968. P.L. 858, § 1.

4 *See* Judiciary Act of 1976, No. 142, § 2, ch. 59, subch. A, § 5942, 1976 Pa. Laws 586, 725-26.

5 The Statutory Construction Act provides in relevant part:

> § 1922. Presumptions in ascertaining legislative intent
>
> In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:
>
> * * *
>
> (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

1 Pa.C.S. § 1992(4).

6 At this point, I also observe that the sentence from *Taylor* that the majority cites to support its reading of that decision-that "[n]o one could know with certainty whether the documents as deleted by the newsman would still reveal sources of information which the [Shield Law]" intended to protect[], 193 A.2d at 186-served only to explain why the trial court would not have accomplished its goal to protect the identity of persons through its production order. *Id.* at 186.

7 Our decision in *Hatchard v. Westinghouse Broadcasting Co.,* 516 Pa. 184, 532 A.2d 346 (1987), also illustrates my point. In that case, we held that "unpublished documentary information gathered by a television station is discoverable by a plaintiff in a libel action to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information." *Id.* at 348-49, 350-51. If *Taylor,* as written, stands for the proposition the majority ascribes to it, we would have based our decision in *Hatchard* on *Taylor.* However, we did not. Instead, in *Hatchard,* we expressly recognized that *Taylor* was inapplicable and grounded our interpretation of the Shield Law in defamation cases on the "constitutionalization" of the area and the fact that the Pennsylvania Constitution expressly identifies reputation as a fundamental interest. *Id.* at 348.

8 Inasmuch as I would reverse the Superior Court's order on a statutory basis, I would not reach the issue raised under the First Amendment to the United States Constitution.

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# EXHIBIT 7

516 Pa. 184
Supreme Court of Pennsylvania.

George HATCHARD and Mt. Pocono AMC/Jeep, Inc., Appellants,
v.
WESTINGHOUSE BROADCASTING COMPANY and KYW-TV 3, Appellees,
Zigmond LEFKOSKI, Jr., Appellant,
v.
NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV News, Appellee.

Argued Jan. 28, 1987.
|
Decided Oct. 15, 1987.

**Synopsis**
Two separate actions were brought against television broadcasting entities as result of news broadcasts, upon allegations of defamation in first action and that broadcast conveyed impression that auto body shop engaged in questionable business practices in second action. Motions to compel production of documents were filed in both cases. Motion in first case was granted in part by the Court of Common Pleas of Philadelphia County, Civil No. 5727 October Term, 1979, Greensberg, J., and television broadcasting entity appealed. Motion was granted in full in second action by Court of Common Pleas of Luzerne County, Civil No. 2409-C 1984, Brominski, J., and television broadcasting entity appealed. Appeals were consolidated, and the Superior Court, No. 02219 Philadelphia 1982, No. 01056 Philadelphia 1985, 350 Pa.Super. 1, 504 A.2d 211, Spaeth, President Judge, reversed and remanded. After grant of plaintiffs' petitions for allowance of appeal, the Supreme Court, No. 89 E.D. Appeal Dkt. 1986, Nix, C.J., held that unpublished documentary information gathered by television station was discoverable by plaintiff in libel action to extent that documentary information did not reveal identity of personal source of information or could be redacted to eliminate revelation of personal source of information.

Superior Court orders reversed and matters remanded to trial courts.

Hutchinson, J., concurred in the result.

West Headnotes (3)

[1] **Constitutional Law**
Reputation
**Pretrial Procedure**
Documents, Papers, and Books in General

Unpublished documentary information gathered by television station is discoverable by plaintiff in libel action to extent that documentary information does not reveal identity of personal source of information or may be redacted to eliminate revelation of personal source of information, balancing shield law against constitutionally protected interest of individuals in protecting their reputation. Const. Art. 1, §§ 1, 11; 42 Pa.C.S.A. § 5942(a).

26 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Journalists

"Source," within "Shield Law" that protects television station news personnel from being required to disclose sources of information, includes inanimate objects such as documents as well as persons. 42 Pa.C.S.A. § 5942(a).

11 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Journalists

In enacting the "Shield Law" protecting television station news personnel from being required to divulge the source of information, the legislature did not intend to shield from scrutiny all information that an alleged defamer had available to it prior to the publication of the defamatory statement, but intended to shield only that information that could reveal the confidential informant. 42 Pa.C.S.A. § 5942(a).

14 Cases that cite this headnote

**Attorneys and Law Firms**

**346 *185 James E. Beasley, Keith S. Erbstein, William P. Murphy, Philadelphia, for Hatchard et al.

Charles J. Bufalino, Jr. and Charles J. Bufalino, III, West Pittston, for Lefkoski.

Jerome J. Shestack, Carl A. Solano, Gayle Chatilo Sproul, Samuel E. Klein, Philadelphia, for Westinghouse et al.

Lawrence M. Ludwig, Bruce L. Morgan, Scranton, for NEP Communications.

Kim R. Tulsky, Philadelphia, amicus curiae, for Caulkins Newspapers, Inc. and Mgty. Publishing Co.

Jane E. Kirtley, Washington, D.C., for The Reporter's Commission for the Freedom of the Press, et al.

Irwin Karp, for The Authors League of America, Inc.

Before NIX, C.J., and FLAHERTY, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

*186 OPINION

NIX, Chief Justice.

These consolidated appeals present the question of whether the Pennsylvania Shield Law, 42 Pa.C.S. § 5942(a), protects from discovery by a plaintiff in a libel action all unpublished documentary information gathered by a television station.

**347 Both appeals arise out of libel actions against local television stations and their parent broadcasting companies for news broadcasts that allegedly defamed the respective plaintiffs. In the first case, appellants George Hatchard and Mount Pocono AMC/JEEP, Inc., ("Hatchard") sued appellees Westinghouse Broadcasting Company and KYW-TV ("KYW"), complaining that certain news reports concerning Hatchard's sale of automobiles to the City of Philadelphia defamed Hatchard. On February 11, 1982 the trial court granted Hatchard's discovery request for the production of "outtakes" [1] but expressly excluded from discovery "any material where another source is revealed or where the material contains information which could reasonably lead to the disclosure of another source by the primary source...."

In the other matter before this Court, appellant Lefkoski filed suit alleging that he was defamed by an NEP Communications, Inc. ("NEP") news broadcast that conveyed the view that his auto repair business had engaged in questionable practices. Lefkoski submitted a discovery request for a wide range of documentary material [2] that might contain *187 information that was available to NEP at the time that it broadcast the alleged defamatory news report. NEP took the position that it was privileged to withhold all documentary material except the materials that were actually broadcast. The trial court granted Lefkoski's Motion to Compel Production of the requested material.

Both orders were appealed [3] to the Superior Court, and the two appeals were consolidated for argument and decision. That court, sitting *en banc,* held that the documents in question were not discoverable. *Hatchard v. Westinghouse Broadcasting Company,* 350 Pa.Super. 1, 504 A.2d 211 (1986). Then-President Judge Spaeth, writing for the majority, expressed the view that this broad interpretation of the Shield Law was compelled by this Court's decision in *In re Taylor,* 412 Pa. 32, 193 A.2d 181 (1963), where we interpreted the Shield Law's protection of the "source" of media information as including documents as well as persons. The majority of the Superior Court insisted that it would have interpreted the Shield Law more narrowly if it had felt free to do so, and that based on a narrower *188 interpretation it would have affirmed the trial courts' rulings to the extent that they allowed the discovery of information that would not disclose a confidential media-informant.

**348 The majority opinion in the Superior Court provoked several vigorous dissenting opinions. [4] The dissenters believed that the Superior Court was not bound by *In re Taylor, supra,* because that case involved a request for documents for use in connection with a grand jury proceeding and thus did not address the scope of discoverable information in a libel action. In addition, the dissenters noted-as did the majority-the significant changes in the law of defamation mandated

by the United States Supreme Court's interpretation of First Amendment requirements. In light of these radical changes in the standards for recovery in defamation actions, the dissenters believed that *In re Taylor* could no longer be viewed as good law.

This Court granted the plaintiffs' petitions for allowance of appeal, assuming jurisdiction pursuant to 42 Pa.C.S. § 724(a) and Rule 1112 of the Pennsylvania Rules of Appellate Procedure. Since the appeals present the common question of the scope of the privilege from discovery afforded to television stations when they are sued in defamation actions, we consolidated these appeals for argument and disposition.

The Shield Law provides in relevant part:

> No person ... employed by any ... television station ... for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit. 42 Pa.C.S. § 5942(a)

The defendant-appellees contend that the Shield Law affords television stations an absolute and complete protective shield against efforts to discover the "source" of any information ***189** obtained while it was in the process of preparing for or broadcasting a news story. The appellants take the position that the privilege afforded by the Shield Law is limited to the protection against the production of information that could lead to the disclosure of the identity of a confidential news informant.

The question presented in the instant appeals is basically one of statutory interpretation. The object of such interpretation is, of course, to ascertain the legislature's intent in enacting the statute. 1 Pa.C.S. § 1921(a). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

It is evident, however, that the term "source" as used in the Shield Law does not have a plain meaning that resolves the present controversy. In *In re Taylor* we held that the term "source" included inanimate objects such as documents as well as persons. We adhere to that view in the present cases.

However, the present cases present an issue which goes far beyond the one presented in *In re Taylor,* namely, whether the use of the term "source" in the context of the statute reflects a legislative intention to protect *all* documentary information from discovery by a plaintiff in a defamation action, regardless of whether the documentary information could reveal a confidential media-informant. That issue is especially significant because the "constitutionalization" of defamation law since *In re Taylor* has made it unmistakably clear that an affirmative answer to the question will immunize many individuals who maliciously or negligently publish false and defamatory statements about others from any legal responsibility for the serious harm caused to the reputation of the targeted individuals.

The constitutionalization of defamation law began, of course, with the United States Supreme Court's decision in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in which it was established that the First Amendment, made applicable to the states ***190** through the Fourteenth Amendment, required a privilege of fair comment and honest mistake of fact and thus a public official could not recover damages for a ****349** defamatory falsehood relating to his official conduct absent proof that the statement was made with "actual malice," *i.e.,* that it was made with knowledge of its falsity or with reckless disregard for whether it was false or not. *Id.* at 279-280, 84 S.Ct. at 725-26. The *New York Times* rule was extended to include non-governmental public figures in 1967. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court addressed the limitations imposed on recovery for defamation by the First Amendment in the context of a private individual subjected to media coverage. The *Gertz* Court held that "The States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to the private individual" provided that liability was not imposed without fault. *Id.* at 347, 94 S.Ct. at 3010. That rule struck a balance between

First Amendment concerns and the "strong and legitimate state interest in compensating private individuals for injury to reputation," *id.* at 348, 94 S.Ct. at 3011, by requiring a lesser showing than actual malice in the case of a private individual and at the same time shielding the media from the rigors of strict liability. In one of the most recent developments in the constitutionalization process, the Supreme Court has held that the First Amendment precludes a state from imposing on a media defendant the burden of proving the truth of a defamatory statement; proof of falsity thus became an additional element of the plaintiff's case. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

One decision of the United States Supreme Court which runs counter to the trend of protecting the media at the expense of the defamed individual is particularly significant in the context of the instant appeals. In *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), that ***191** Court, recognizing the need to mitigate the effect of *New York Times* and its progeny, held that the First Amendment did not bar a plaintiff from inquiring into the editorial processes of the media defendant responsible for the publication of a defamatory statement. Thus, in attempting to shoulder the heavy burden of demonstrating "actual malice," the plaintiff was entitled to discovery of the information available to the media defendant at the time of the defamatory publication to permit a meaningful inquiry into whether the statement was maliciously or recklessly made. If we were to embrace the broad interpretation of the Shield Law urged by appellees, even the *Herbert* Court's rare concession to the defamation plaintiff would be negated. If unpublished information which would not reveal confidential sources could be withheld by the media defendant, it would be virtually impossible for the plaintiff to arrive at those facts of which the defendant was aware at the time of publication other than the defamatory information actually disseminated to the public.

The immediate question before the court is whether the legislature has evidenced an intention to go so far as to preclude disclosure of all information in the possession of a media defendant in order to encourage a free flow of information to the news media. In light of the barriers to recovery already imposed by the First Amendment, if that question is answered in the affirmative, we must then face the issue of whether such an extreme exercise of legislative power to protect freedom of expression is compatible with the protection of other fundamental values protected by the Pennsylvania Constitution such as an individual's reputation.

It is obvious that in some instances documentary information can be disclosed to a plaintiff in a libel action without revealing the identity of the person who conveyed the information to the defendant in confidence. In other instances, the nature of the documentary information or the circumstances of its acquisition would render disclosure of the information impossible without a disclosure of the person ***192** who conveyed it. Our task in ascertaining the legislative intent in the Shield Law is to determine how broad a shield the legislature intended to erect between ****350** an alleged defamer and its victim. We must therefore determine whether the legislature intended to shield from scrutiny *all* information that an alleged defamer had available to it prior to the publication of the defamatory statement, or only that information that could reveal a confidential informant.

Since the legislature's intent in this regard cannot be ascertained from a plain reading of the words in the Shield Law, we look to statutory purpose for guidance. The obvious purpose of the Shield Law is to maintain a free flow of information to members of the news media. *See, e.g., In re Taylor, supra* 412 Pa. at 41, 193 A.2d at 185. We fail to see how this purpose is promoted by protecting from discovery documentary information that was in the possession of the publisher of the defamatory statement where disclosure of this information would not reveal the identity of a confidential media-informant. While there may be some who would only share information with the media if the media enjoyed an absolute shield from any discovery in civil proceedings, providing an absolute shield could hardly be said to be necessary to effectuate the purpose of the Shield Law in light of the information that flows freely in states that have enacted more carefully-tailored shield laws and the considerable burden of proof imposed on a defamation plaintiff by the requirements of the First Amendment. We see no apparent reason why the objective of promoting the free flow of information to the media would be defeated so long as any documentary information that could lead to the discovery of the identity of a confidential informant is shielded from disclosure.

We do not believe the legislature has evinced any intention to make it close to impossible for individuals to seek redress against the media for maliciously or negligently

publishing false statements that seriously damage the reputations of individuals. Such a result would follow if we interpreted the Shield Law as broadly as appellees urge ***193** because of the changes in the law of defamation since *In re Taylor* was decided, and would run afoul of the principle of statutory construction that the legislature must be presumed not to intend a result that is absurd, impossible of execution or unreasonable. 1 Pa.C.S. § 1922(1).

More significantly, however, in interpreting the statute in question we must presume that the legislature did not intend to violate the Constitution of the United States or of this Commonwealth. 1 Pa.C.S. § 1922(3). Were we to interpret the Shield Law's protection as broadly as appellees urge, serious questions would arise as to the constitutionality of the statute in light of the protection of fundamental rights provided for in the Pennsylvania Constitution. The Pennsylvania Constitution expressly identifies reputation as one of the fundamental interests that cannot be abridged by the legislature. Article I, section 1 of the Pennsylvania Constitution provides:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and *protecting* property and *reputation,* and of pursuing their own happiness. Pa.Const. Art. I, § 1 (emphasis added).

In addition, Article I, section 11 explicitly mandates that a legal remedy be available for injuries to reputation:

> All courts shall be open; and *every man for an injury done him* in his lands, goods, person or *reputation shall have remedy by due course of law and right and justice administered without sale, denial or delay.* Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct. Pa.Const. Art. I, § 11 (emphasis added).

This Court has acknowledged previously that the Pennsylvania Constitution establishes reputation as one of the fundamental rights that cannot be abridged without compliance with state constitutional standards of due process and equal protection. *See Wolfe v. Beal,* 477 Pa. 477, 384 A.2d 1187 (1978) (individual committed to state mental hospital in ***194** violation of due process rights entitled to destruction of hospital ****351** records to protect reputation); *Moyer v. Phillips,* 462 Pa. 395, 341 A.2d 441 (1975) (exception in survival action for causes of action for libel and slander is arbitrary and thus violative of equal protection rights afforded under the state constitution for the protection of a fundamental right such as reputation). In fact, we have recognized that our Declaration of Rights places reputation "in the same class with life, liberty and property." *Meas v. Johnson,* 185 Pa. 12, 19, 39 A. 562, 563 (1898).

Indeed, it was this Court's recognition of special value placed on an individual's reputation in the Pennsylvania Constitution that buttressed this Court's view that defamatory statements should be presumed to be false with the burden being placed on the defendant to prove otherwise. *See Hepps v. Philadelphia Newspapers, Inc.,* 506 Pa. 304, 485 A.2d 374 (1984), *rev'd.,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). Since the presumption of falsity may no longer be invoked in a defamation action in light of the United States Supreme Court's reversal of our decision in *Hepps,* were we to interpret the Shield Law as broadly as the Superior Court we would face serious questions regarding the compatibility of the Shield Law and Article 1, Sections 1 and 11 of the Pennsylvania Constitution.

Under standards mandated by the federal constitution, a plaintiff who claims harm to a fundamental interest protected by the Pennsylvania Constitution would face the burden of proving that a defamatory statement was maliciously or negligently published and that the statement was false. On the other hand, the media defendant who is alleged to be a malicious or negligent defamer would have carte blanche to withhold from judicial scrutiny any documentary information in his possession that it did not voluntarily publish. It is

difficult to see how any "fundamental interest" protected by our State Constitution could survive such a legal scheme. Citizens of the Commonwealth of Pennsylvania would in effect hold a fundamental right protected by the State Constitution; yet when the fundamental right was seriously ***195** damaged the courts could offer a meaningful remedy in only the rarest of cases. We decline to impute such an intention to the legislature. We therefore conclude that, to the extent that language in *In re Taylor* may be read as interpreting the Shield Law to protect from discovery, in defamation actions, documentary material that could not reasonably lead to the discovery of the identity of a confidential media-informant, that decision interpreted the Shield Law much too broadly. Given the present state of First Amendment jurisprudence, such an interpretation would not adequately protect the fundamental right of reputation guaranteed to the citizens of this Commonwealth. We therefore hold that unpublished documentary information gathered by a television station is discoverable by a plaintiff in a libel action to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information. Since the trial court order allowing discovery in *Hatchard* was limited to information that could not reasonably lead to the discovery of the identity of personal sources of information, the Superior Court's order disallowing such discovery must be reversed. Since the trial court's order in *Lefkoski* was not limited expressly in this manner, the Superior Court's order disallowing all of the requested discovery must be reversed and the cause remanded to the trial court for the entry of an order consistent with this opinion.

Accordingly, the orders of the Superior Court are reversed and the matters are remanded to the respective trial courts. The order entered by the trial court compelling discovery in *Hatchard* is reinstated. The order entered by the trial court in *Lefkoski* is reinstated subject to modification consistent with this opinion.

LARSEN and McDERMOTT, JJ., did not participate in the consideration or decision of these cases.

HUTCHINSON, J., concurs in the result.

**All Citations**

516 Pa. 184, 532 A.2d 346, 56 USLW 2256, 14 Media L. Rep. 2000

Footnotes

1 Outtakes are films prepared for a television broadcast but not actually shown in the broadcast. *See* Webster's New World Dictionary (2d Coll. ed. 1982) at 1101.

2 Mr. Lefkoski's motion, as quoted in the majority opinion of the Superior Court, requested discovery of the following:

> 1. All writings, photographs, tapes, films, scripts, sound reproductions, records, editorial records, and other compilations of data of, concerning or relating in any way to the following:
>
> a. Any investigation or investigations made by the defendant concerning the plaintiff and/or plaintiff's business, known as Ziggy's South Wilkes-Barre Auto Body Shop, Rear 611 South Main Street, Wilkes-Barre, PA 1870 [sic].
>
> b. Any information which on or before May 29, 1984 became known to the defendant concerning the plaintiff and/or plaintiff's said business.
>
> c. The interview conducted on or about May 23, 1984 by agents and/or employees of the defendant with the plaintiff at the aforesaid place of business of the plaintiff.
>
> d. The complete television news broadcasts transmitted by the defendant on May 28, 1984 and May 29, 1984 and in which the said broadcasts included any reference whatever to the paintiff and/or plaintiff's said business.
>
> e. The anchor-intro to the aforesaid television news broadcasts.
>
> f. The teases to the aforesaid television news broadcasts.
>
> g. All matters edited from and/or omitted from the final form of the aforesaid interview and television news broadcasts.
>
> 350 Pa.Super. 1, 8-9, 504 A.2d 211, 214 (1986).

3 In the *Hatchard* matter the trial court refused to certify its order as involving a controlling question of law as to which there is substantial ground for difference of opinion, Pa.R.A.P. 1311, the predicate for an interlocutory appeal by permission. KYW therefore filed a Petition for a Writ of Prohibition or Mandamus in the Superior Court. That court treated KYW's Petition as a petition for review, which it granted. In the *Lefkoski* appeal, the trial court did certify its order pursuant to Pa.R.A.P. 1311 and the Superior Court granted NEP's petition to permit an interlocutory appeal.

4 Judge Wieand filed a dissenting opinion which was joined by Judges Rowley and Cirillo. Judges Cirillo and Tamilia also filed dissenting opinions.

**End of Document**

## CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within Defendant Range Resources—Appalachia, LLC's Response in Opposition to The Pittsburgh Post-Gazette's Omnibus Motion to Quash Subpoenas has been served via e-mail, this 7th day of March, 2019, to the following:

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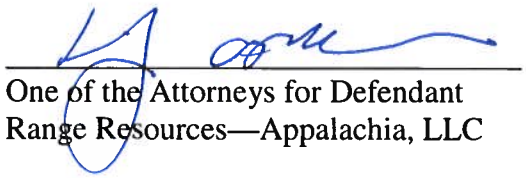

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